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NUCLEAR REGULATORY COMMISSION

Title: Powertech USA, Inc.
Dewey-Burdock in Situ Uranium
Recovery Facility

Docket Number: 40-9075-MLA

ASLBP Number: 10-898-02-MLA-BD01

Location: Rapid City, South Dakota

Date: Thursday, August 29, 2019

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 ATOMIC SAFETY AND LICENSING BOARD PANEL HEARING

5 + + + + +

6 OPEN SESSION

7 -----x

8 In the Matter of: : Docket No.

9 Powertech USA, Inc. : 40-9075-MLA

10 (Dewey-Burdock in Situ: ASLBP No.

11 Uranium Recovery : 10-898-02-MLA-BD01

12 Facility) :

13 -----x

14 Thursday, August 29, 2019

15
16 The Hotel Alex Johnson

17 Ballroom

18 523 Sixth Street

19 Rapid City, South Dakota

20
21 BEFORE:

22 WILLIAM J. FROEHLICH, Chair

23 MARK O. BARNETT, Administrative Judge

24 G. PAUL BOLLWERK, III, Administrative Judge

25

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P R O C E E D I N G S

(9:01 a.m.)

JUDGE FROEHLICH: Our plan today is to start at 9:00 and I appreciate everyone being here promptly so that we can begin at 9:00. We have the room until 6:00 again and I'll do my best to get through my questions and also, those of the Members of the Board.

I'd also like to mention to the counsel for the parties that there is an opportunity for you to compare questions that you would like the Board to answer and may I suggest that you do that as we go along.

And then, later today, or -- we'll provide an opportunity for you to pass them up and then the Board will consider asking them of the witnesses, so I just wanted to let you know that that opportunity exists and if we do that, as we go along, and then ask the questions towards the end of our session, we'll be able to have your questions asked as well.

All right. I'd like to pickup where we left off and then move on to another set of topics as soon as we finish where we were yesterday. Judge Barnett, you had a follow-up?

JUDGE BARNETT: Yes. Good morning, Ms.

1 Diaz. I did have a follow-up from yesterday.

2 MS. DIAZ-TORO: Yes.

3 JUDGE BARNETT: We talked about the
4 staff's position was that you had characterized sites
5 out there from small, moderate, to large effects, and
6 so therefore, any other sites that you identified
7 wouldn't change the need for hard look, it would just
8 change mitigation measures, is that correct?

9 MS. DIAZ-TORO: It would not change our
10 overall conclusions in the NEPA document with respect
11 to the, you know, level of significance for the
12 impacts. It would -- it could change the, yes, the
13 mitigation measures.

14 So we would -- so what we go -- when we go
15 out with the tribe, and what we did, for example, in
16 2013, and in other projects, when we have conducted
17 other tribal site surveys, we go out and we identify
18 -- well, not we, sorry, I apologize, the tribe
19 identifies a site that is of significance to them, and
20 they are the ones who can explain to us.

21 And then we document the significance of
22 it, so they are the ones that ascribe the
23 significance. Based on the features and significance
24 of the site, then we're able -- so to assess the
25 impacts directly to that one site.

1 And therefore, you know, any mitigation
2 measures, if it's, you know, in the area of where well
3 fields will be located in this project, we can then
4 discuss potential mitigation measures, such as, for
5 example, if the well can be moved so that, you know,
6 the site is not -- is protected. It's preserved as
7 is.

8 Maybe it's a tribal ceremony that they
9 would like to conduct in the area. So depending on
10 the significance and the information that we gather
11 about that specific site, we can determine the direct
12 impact, and then, the mitigation measure.

13 When we talk about -- when we're talking
14 about NEPA, we're talking about whether it's
15 significant or not -- significant impact or not a
16 significant impact.

17 When we do talk about a significant
18 impact, the NRC then has established the small,
19 moderate, and large significant levels, so it is
20 significant.

21 We have already determined that the
22 environmental impact, or the impact to the sites, is
23 of significance, and then we go on and determine
24 whether it's small, moderate, or large.

25 So --

1 JUDGE BARNETT: You do that for each site,
2 small, moderate, or large?

3 MS. DIAZ-TORO: We do that for each site.
4 That's correct.

5 JUDGE BARNETT: Okay. So my question is,
6 then, what if you've found -- you've already found a
7 large site, right?

8 MS. DIAZ-TORO: Correct. A large impact.
9 Right.

10 JUDGE BARNETT: Right, large impact site,
11 so conclusion was that anything else you find was only
12 going to change mitigation measures. It wouldn't
13 change the overall conclusion, is that --

14 MS. DIAZ-TORO: That's correct. And it
15 could change. You know, it depends on what the site
16 is, where it's located with respect to the activities
17 that will be conducted around the site, and the
18 significance of the site, then it could be impacted,
19 it could not be impacted, and then the mitigation
20 measure would be developed accordingly.

21 JUDGE BARNETT: My question is, though,
22 what if you found -- I don't know how many large
23 impacts you've found out there so far, but what if you
24 went and found a bunch of other different large
25 impacts that you were going to have?

1 So it was, you just increased the number
2 of large impacts.

3 MS. DIAZ-TORO: It would still be large,
4 right? The overall impact determination in our NEPA
5 document would still be a large impact. It's a
6 significant impact.

7 For that particular site, then we would
8 have to gather, in collaboration with the tribe,
9 determine what would be the appropriate mitigation
10 measure based on the specifics of the site; the
11 characteristics, the significance, and then the
12 activities that are occurring around the site.

13 JUDGE BARNETT: Thank you.

14 MS. DIAZ-TORO: You're welcome.

15 JUDGE BOLLWERK: Just one, so we're using
16 the word, site, and I think we're getting -- there's
17 the site, and then there may be the site of a
18 particular artifact, and artifact's the wrong word, a
19 feature or -- but you don't really -- you don't rate
20 each of the particular instances if the tribe says,
21 this is something we're concerned about, is it, small,
22 medium, or large, right?

23 Those are just, they're there and they
24 need to be mitigated. Do you rate in them in some way
25 or do you rank them? I don't know.

1 MS. DIAZ-TORO: We do provide the -- in
2 the EIS, there are tables where --

3 JUDGE BOLLWERK: Right.

4 MS. DIAZ-TORO: -- we do have the --
5 whether it's the direct effect and whether it's a
6 small, moderate, or large for the different specific
7 --

8 JUDGE BOLLWERK: Okay.

9 MS. DIAZ-TORO: -- resources; tribal,
10 cultural resources that we find at the project site.

11 JUDGE BOLLWERK: So if it's, obviously, on
12 the National Register of Historic Places, that's
13 obviously going to have a large impact because you're
14 not supposed to touch those, in theory; generally.

15 MS. DIAZ-TORO: Well, so in our --
16 certainly, the preferred method for a mitigation
17 measure is avoidance, which is, you know, to preserve
18 it and protect it as it is.

19 In some instances, you know, I -- we found
20 that that might not be possible, for a number of
21 reasons, and so then you identify other mitigation
22 measures.

23 When it comes to the Section 106, it's a
24 little bit -- it's, we are determining impacts to
25 tribal cultural resources, but the eligibility

1 consideration comes into play, and so if the site is
2 not -- if the tribal cultural resource is not found
3 eligible, then that tribal cultural resource, if we
4 follow the Section 106 process, would not be assessed
5 for impacts.

6 It's only those that are found eligible.
7 In our NEPA document, what we have done is identify
8 all the tribal cultural resources that have been
9 identified or that were identified during the
10 archaeological Class III survey that the -- that
11 Powertech conducted prior to submitting the license
12 application, and then during the tribal cultural
13 survey that was conducted in 2013.

14 All those tribal sites, all of those were
15 documented in the EIS, whether they were eligible or
16 not eligible, and based on the impact assessment on
17 the sites, we determined that the range of impacts for
18 all of those sites -- tribal cultural resources
19 identified would be from small to large.

20 Some would have a small impact, some would
21 have a large impact, but again, that means, in NEPA,
22 the small, moderate, and large is something that NRC
23 has developed and established, in NEPA, it's whether
24 an impact is of significance or not significant.

25 So we have established, in our EIS, that

1 the impacts to tribal cultural resources that have
2 been identified throughout the surveys that have been
3 documented are significant impacts.

4 And therefore -- and then, like I said, we
5 assign a level of significance to those tribal
6 cultural resources.

7 JUDGE BOLLWERK: And I think as you
8 testified to yesterday, if I'm recalling it correctly,
9 you tended to be flexible in your interpretation,
10 given the issues with how the designation factors
11 interact with the tribe's -- with a TCP generally, and
12 how a tribe might find something as being significant
13 to them.

14 MS. DIAZ-TORO: Let me see if I understood
15 correctly. We do -- we know -- we recognize that
16 we're not the party with the knowledge to either
17 identify or ascribe significance, so we do defer to
18 the tribe to provide that information.

19 If they say it's significant, we work with
20 them to ensure that we have documented it correctly
21 with the appropriate protection of sensitive
22 information, of course. And then that's how it's
23 documented in the NEPA -- in our EIS.

24 JUDGE BOLLWERK: Thank you.

25 MS. DIAZ-TORO: You're welcome.

1 JUDGE FROEHLICH: All right. I'd like to
2 begin with Dr. Morgan, if I may, and in reading your
3 CV, OST-44, revised, at Pages 4 to 7, there's a list
4 of TCP projects that you have worked on.

5 And I was, as I went through there,
6 wondering which ones, or which ones would you pick
7 out, that were similar to the kind of project that
8 we're looking at here, either as to size, scope, or
9 approach?

10 DR. MORGAN: When you do cultural resource
11 management work, or TCP work, there's some
12 standardized things that are done out in the field.
13 You do all of that background research, you prepare
14 your maps, you discuss with your team, and you go out
15 and you do your fieldwork.

16 And so there are some similarities across
17 the board that can be recognize; that can be noted.
18 Each project also is different, no matter whether it's
19 for doing a well pad, for an oil and gas industry, or
20 for a wind farm, there are differences in how they're
21 done, and each company does things a little
22 differently.

23 Each crew that goes out will do things a
24 little bit differently, but there are some uniform
25 things that are done according to what's being

1 referred to as the scientific method here.

2 Your transects are going to be similar, it
3 should be, in any archaeological survey that's a CRM.
4 Now, you're going to have different differences with
5 a TCP survey, the transects are going to be narrower.

6 And so I hope that answers your question.

7 JUDGE FROEHLICH: Well, let me tell you
8 what I'm trying to do and then maybe you can point me
9 to some of the studies that you worked on that will
10 help me get there.

11 There's a methodology that has been
12 proposed by the staff, which is referred to as the
13 March 2018 approach, and I understand that there's --
14 there have been alternative tribal approaches to
15 accomplishing the same goal, identifying TCP trails.

16 I was wondering if the projects that you
17 worked on, are they similar in approach to the March
18 2018 approach that the parties have been working on or
19 are these projects that you worked on similar in
20 approach -- similar to the approach that the tribe has
21 suggested as an alternative to the March 2018
22 approach?

23 DR. MORGAN: Well, in any project where a
24 company is paying for the survey work, there's always
25 a hotel, and per diem, and the meals, and all of that

1 that are taken care of, and then if there's a firm
2 that's working under contract, whether it's a CRM
3 company or a TCP company, they've got a contract.

4 And so that's what missing from the March
5 2018 document. There's those four pieces, but there's
6 no contract for paying. There's no mention of an
7 amount or a section where you would contract to
8 anyone.

9 And so it is quite -- I've never seen
10 where a company doesn't get paid or, you know, this
11 whole thing about the tribe and a \$10,000 stipend, the
12 history of how various agencies have done that, that
13 is -- that's separate.

14 But in terms of the work that I've done,
15 of course I've been paid, you know? So it's -- this
16 March 2018 document is very odd to me that -- and I've
17 -- how would you not have a piece in there where you
18 are paying either a CRM company and/or a TCP company
19 to do that work?

20 It's just highly -- it's just unusual.
21 It's not the norm. So how do you not pay for the work
22 that is to be done?

23 So in the work that I've done in terms of
24 the -- whether it's when I've worked for CRM companies
25 and/or in my own company, and the work that I've done,

1 you go out and you do the fieldwork, and you have a
2 set contract, and that methodology is followed very
3 closely.

4 But if you don't have a methodology that
5 has all of the pieces to it, then how can you arrive
6 at a determination? And if -- so the work that I've
7 done and going out and, yes, there's similar -- many
8 similarities that I could draw upon in terms of the
9 actual fieldwork that's done. I think that's what
10 you're asking.

11 JUDGE FROEHLICH: I think the problem I'm
12 having is, the definitions the parties have been using
13 for a methodology. I understood the March 2018
14 methodology, or approach, to include five or so
15 elements; including a pedestrian survey, tribal elder
16 interviews, literature research.

17 And then, I guess, within each of these
18 five elements, there's a methodology to be applied.
19 And I think that's what you were talking about now.

20 DR. MORGAN: Yes, and there are some of
21 the elements, but they're certainly not all there, and
22 there's certainly -- the thing that's most interesting
23 to me about this document is, in several of the
24 sections, if you look at the very bottom, in italics,
25 it tells us that this is to be, you know, looked at

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1 and expounded upon more closely, as per the
2 conversations, and the agreements, and the things that
3 are put in at a later point.

4 And I'm, of course, not quoting it, but if
5 you threw it up on the screen, we could reference it,
6 and that's --

7 JUDGE FROEHLICH: That might help. To
8 which exhibit are you referring?

9 DR. MORGAN: The proposal.

10 JUDGE FROEHLICH: Proposal.

11 DR. MORGAN: And so --

12 JUDGE FROEHLICH: The March 2018 approach?

13 DR. MORGAN: Yes.

14 JUDGE FROEHLICH: Okay. That's NRC-192.

15 MS. DIAZ-TORO: Your Honor, if I --

16 JUDGE FROEHLICH: Sure.

17 MS. DIAZ-TORO: Dr. Morgan, I think you
18 might be referring to the --

19 DR. MORGAN: Yes, no, the proposal.

20 MS. DIAZ-TORO: Right.

21 DR. MORGAN: I'm actually referring to the
22 proposal.

23 JUDGE FROEHLICH: Proposal. The staff
24 proposal. That's 214?

25 MS. DIAZ-TORO: I just wanted to clarify

1 --

2 DR. MORGAN: It informs the work that's
3 going to be done.

4 MS. DIAZ-TORO: It confirms.

5 JUDGE FROEHLICH: Counsel, 214?

6 MR. STILLS: Your Honor, I would object to
7 counsel coaching the witness. If you have questions,
8 we would like to see your follow-up with March 2018.

9 JUDGE FROEHLICH: I just like to know what
10 exhibit we're referring to so we can all be on the
11 same page. Thank you, Counsel.

12 MS. DIAZ-TORO: It is, sorry, 214.

13 JUDGE FROEHLICH: Okay. And it's --

14 MR. STILLS: And I believe she was
15 referring to the March 2018 letter, which is 192?

16 JUDGE FROEHLICH: Right. And then I
17 believe Dr. Morgan said, no, she would like us to
18 focus on the staff proposal, I thought.

19 DR. MORGAN: Well, I'm referring to both,
20 actually. And if we looked at both, and we can draw
21 inferences and we can look at both documents.

22 JUDGE FROEHLICH: Okay.

23 DR. MORGAN: And we can see, and in the
24 italicized part that I'm talking about --

25 JUDGE FROEHLICH: Okay.

1 DR. MORGAN: -- is coming from the
2 proposal.

3 JUDGE FROEHLICH: That's technologically
4 feasible and we're going to work between NRC-192 and
5 NRC-214.

6 DR. MORGAN: There's a lot of documents.

7 JUDGE FROEHLICH: Yes. All right. Dr.
8 Morgan, in 214, you want us to focus on --

9 DR. MORGAN: Well, that's my resume.

10 JUDGE FROEHLICH: And, Andy, can you throw
11 them on these screens as well. It's not here.

12 JUDGE BOLLWERK: I have it. Well, he's
13 checking that, can I ask a question just to clarify
14 that?

15 JUDGE FROEHLICH: Of course.

16 JUDGE BOLLWERK: So, Dr. Morgan, you're
17 talking about a CRM firm and a TCP firm? I take it a
18 TCP firm probably is a narrower range of expertise
19 than a CRM firm, or am I jumping to a conclusion?

20 DR. MORGAN: Not necessarily.

21 JUDGE BOLLWERK: Okay.

22 DR. MORGAN: You can have a TCP firm that
23 is doing strictly TCP work and you can have a TCP firm
24 that has archaeologists that are registered
25 professional archaeologists that actually can do the

1 -- they can do both. They can do CRM and TCP work,
2 because they have that expertise, because they have
3 professional archaeologists on their team, and they
4 have those individuals who are native that have the
5 specialized expertise in religious and cultural
6 significance.

7 JUDGE BOLLWERK: And so I take it there's
8 some -- I think there's TCP -- I'm sorry, there's CRM
9 firms that don't do TCP work, or wouldn't do TCP work,
10 because they don't have the expertise.

11 DR. MORGAN: The CRM firms do not have TCP
12 expertise. They are archaeologists. When they go out
13 and do fieldwork, and that's what was a little
14 confusing about yesterday, in terms of, there has to
15 be a distinction made.

16 When cultural resource management firms
17 are, they're archaeologists that are doing their
18 archaeology work, and when they work directly with
19 tribes, and bring on tribal monitors with that
20 specialized expertise, those monitors are not working
21 for the CRM firm, they are partnered with them to do
22 the work, and they are individuals who are tribal
23 cultural specialists that are working through the THPO
24 offices, that go out and do this work when they go out
25 with the CRM firms.

1 But it's not the CRM firm that has any of
2 the expertise. That's why they're taking the TSS's
3 out with them.

4 JUDGE BOLLWERK: Thank you.

5 DR. MORGAN: And the TCP firms, they have
6 all of the expertise under their expertise as -- to do
7 work in traditional cultural properties, and
8 sometimes, they actually have archaeologists on staff
9 too where they can do both the CRM work and the TCP
10 work.

11 JUDGE BOLLWERK: Thank you. Appreciate
12 it. Go ahead.

13 JUDGE FROEHLICH: All right. In Exhibit
14 214, you wanted to highlight some portion of some
15 footnote in it, Dr. Morgan?

16 DR. MORGAN: Yes, can we see the rest of
17 the document? This is what I'm talking about. That's
18 similar to this -- yes, similar to the proposal, and
19 this is where I might have been sounding a little
20 confused, but there's no confusion in this.

21 Look at the -- this is a working document
22 to be developed in collaboration with the tribes, and
23 based on the tribe's self-determination. If you look
24 to the proposal, there's similar language, and it's
25 talking about, well, we're going to continue working

1 on this.

2 Well, it's not a complete document. It's
3 work in progress. It hasn't -- it's not a fully
4 fleshed out methodology.

5 JUDGE BOLLWERK: All right. And just for
6 record purposes, we're referring to Page 6 on NRC-214,
7 the parenthetical expression that's, I guess, in
8 italics at the bottom.

9 JUDGE FROEHLICH: Thank you, Judge
10 Bollwerk.

11 MS. DIAZ-TORO: Your Honor, may I --

12 JUDGE FROEHLICH: Yes.

13 MS. DIAZ-TORO: -- provide additional
14 information with respect to the methodology? In the
15 March 2018 approach --

16 JUDGE FROEHLICH: Right.

17 MS. DIAZ-TORO: -- both of them, just
18 because they're interrelated, and I'll go back, even,
19 if you all allow me, a little bit back into the
20 2012/2013 timeframe, when we were discussing with
21 tribes, the approaches and methods for identification
22 of tribal cultural resources.

23 At that time, the NRC staff, Powertech,
24 the tribes, did consider the use of -- it was
25 considered, the use of a CRM as well as bringing

1 tribal specialists, in the form of, Powertech had a
2 contractor who was a CRM company, and that a
3 methodology, a proposal, survey proposal, was
4 developed that was discussed with the tribes, and that
5 we -- agreement was not reached on that one.

6 A tribal cultural specialist firm was also
7 considered during that time, and discussed, and
8 negotiated, and that was the Makoche Wowapi proposal,
9 and agreement was not reached.

10 Another proposal, which we talked a bit
11 about yesterday, which was the KLJ proposal, which
12 included, also, tribal cultural specialist was also
13 discussed and agreed -- sorry, was also discussed with
14 Powertech and the tribes, and agreement was not
15 reached.

16 So I wanted to bring that additional point
17 of information that consideration and discussions with
18 respect to those organizations, CRM and tribal
19 cultural specialists, were -- was considered back in
20 2012/2013.

21 In developing the March 2018 approach, the
22 NRC staff took into consideration, the items and
23 matters that the tribe had, over the years, identified
24 as fundamental components, and that included upfront,
25 a pedestrian site survey.

1 And the tribe has asserted many times
2 throughout, since 2011, 2012, 2013, that the only way
3 to identify tribal cultural resources at the Dewey
4 Burdock project site is through an on-the-ground
5 pedestrian site survey of the Dewey Burdock project
6 site, which is why in 2013, we conducted tribal
7 cultural surveys using on-the-ground -- we went out
8 and walked the site, and conducted a pedestrian on-
9 the-ground site survey.

10 So that is upfront and fundamental aspect,
11 or component, of the March 2018 approach. In
12 addition, we also understood that they wanted other
13 tribes involved, and we brought the other Lakota Sioux
14 tribes involvement, as well as direct involvement from
15 the tribal's -- from tribal elders.

16 And so we incorporated the ethnographic
17 component, which is the oral history interviews, to go
18 together with the pedestrian site survey.

19 In addition, they always had asked us to
20 bring in a contractor to facilitate the development
21 and the implementation, and so that's what we did with
22 SC&A. We did bring in a contractor to facilitate the
23 development of the methodology and the implementation
24 of the methodology.

25 It was never the NRC's staff intention to

1 have SC&A go out and conduct -- develop a methodology
2 and conduct the -- or implement the methodology on
3 their own. It's always been central to the approach
4 that the tribes participate with -- the tribes
5 participate and go out and conduct the tribal site
6 survey.

7 So that's why in -- so after we developed
8 the March 2018 approach, which took, you know, several
9 months, we went back to the parties of the
10 adjudicatory proceeding, and we asked them if the
11 terms and the components of the March 2018 approach
12 were reasonable to them.

13 And it was our understanding, based on the
14 assertions made in letters and during teleconference
15 calls with the Board, that all the parties to this
16 proceeding that we are right now, agreed that the
17 components of the March 2018 approach were reasonable.

18 And so we moved forward with the
19 development of the document in our Exhibit Number 214,
20 NRC-214, which is the proposed cultural resource
21 ceremony -- sorry, cultural resource methodology. I
22 apologize.

23 Mr. Spangler conducted -- or reviewed
24 different methodologies out there, all of them are
25 identified in the methodology. Two of them are

1 central, the LeBeau and Ball et al methodologies, and
2 that they're central to the development of the
3 February 2019 proposed draft methodology.

4 But Mr. Spangler also reviewed and looked
5 at, and incorporated aspects of the other
6 methodologies that are identified in Section 5 of the
7 NRC-214, and that includes the NDDOT that we were
8 discussing yesterday.

9 The NRC did develop a complete
10 methodology, because that's what we understood the
11 tribe wanted us to do in facilitating the development
12 of the methodology.

13 The italicized portions, what they -- the
14 intention with the 2009 draft proposed methodology was
15 to, one, develop the complete methodology based on the
16 March 2018 approach, and based on the scientific
17 method, so it does have components of the scientific
18 method.

19 It's not just based and fully rigidly
20 using the scientific method. It's informed and based
21 on the scientific method, but equally important is the
22 tribe was -- well, is the tribal input, and therefore,
23 why we, in all the sections, to encourage and elicit
24 tribal input about -- in the different sections of the
25 document, we put the italicized language.

1 It was to encourage and elicit that
2 information, so we have concepts and terms, we have
3 definitions in here, but we understood that it was
4 equally important, even though we did provide them for
5 discussion with the tribes, for them to provide us
6 with their definitions; with their objectives.

7 And that's the purpose of the italicized
8 language in the different sections of the proposed
9 2009. Mr. Spangler, anything that you might want to
10 add?

11 MR. SPANGLER: Yes. I'm having a little
12 bit of issue here this morning with Dr. Morgan's
13 blending of two very distinct terms related to
14 scientific methodologies.

15 When constructing a methodology, it's
16 important to make a distinction between a methodology
17 and a method. A methodology is the overarching
18 theoretical context for the project itself. It's how
19 that research is done or should be done.

20 A scientific method is the size of the
21 transects. The scientific method is the tools, the
22 instrument, used to implement the methodology, and Dr.
23 Morgan is conflating the methods into the methodology.

24 The methodology is the theory. The method
25 is the means to do it and our methodology is

1 constructed specifically to get tribal inputs on the
2 methods. What size of crews do they want? How do
3 they want those crews comprised?

4 Do they want tribal elders? Who do they
5 want on the crews? What's the size? What's the
6 length of, you know, time that's going to be spent on
7 the pedestrian survey?

8 Those are all pieces that the tribe, we
9 were hoping for tribal input, rather than dictating to
10 the tribe who should comprise the crews. It's the
11 tribal input that will identify the specifics of the
12 methods, but the methodology is the Ball et al merged
13 with LeBeau.

14 It's the overarching theoretical context
15 that's outlined in our methodology in each of those
16 sections.

17 JUDGE FROEHLICH: Okay. So we have an
18 approach that is based on a methodology and we're
19 trying to come up with a method to accomplish it. Is
20 that what you just said?

21 MR. SPANGLER: Yes, very much so, and we
22 need the tribal input to identify those methods.

23 JUDGE FROEHLICH: Dr. Morgan.

24 DR. MORGAN: I would say that trying to
25 include something that happened back in 2012 is just

1 not applicable. And the 2018 document is wholly
2 lacking in many respects. And I would hate to say
3 that you need to start all over, but you don't have a
4 document that's been fully fleshed out.

5 You haven't gotten tribal input. You need
6 to go back to the table and conduct the Section 106
7 properly in order to get to the final determination.
8 And that's not going to happen until you've come up
9 with a way to figure out how to bring everybody
10 together and get the job accomplished, do the
11 fieldwork, get the report written, come to the table,
12 and do the hard work that has to be done.

13 And so you can use whatever flowery
14 language you want to, or you can use whatever
15 scientific terms you want to, and it still comes down
16 to that there's been a lack of tribal input.

17 JUDGE FROEHLICH: Okay. I'd like to take
18 what has been just said by both you and the staff, and
19 focus on the attempts to address the italicized
20 footnotes and, I guess, the events leading up to the
21 face-to-face meetings at Pine Ridge in June 2018, and
22 as appropriate, the follow-on meeting at Pine Ridge in
23 2019.

24 I assume, and correct me if I'm wrong,
25 staff, that those meetings that were scheduled to take

1 place, and I guess, did take place to an extent, in
2 June of 2018, were to develop, as Dr. Spangler
3 referred to, the methods to be used to implement the
4 methodology contained in the March 2018 approach, is
5 that correct?

6 MR. SPANGLER: This would be to implement
7 the methodology of the February 2019 proposed
8 methodology.

9 JUDGE FROEHLICH: Okay. I'm glad you made
10 that -- how is the February 29th methodology different
11 from the March 2018 approach? What refinements or
12 changes took place from the time the March 2018
13 approach was proposed and circulated, until the, I
14 guess, until you were onboard and made it better;
15 different?

16 MS. DIAZ-TORO: Mr. Spangler, can I start
17 and then I'll -- just because Mr. Spangler wasn't in
18 June -- during the June 2018 discussions, it was Dr.
19 Nickens, so I would like to start, and then I'll let
20 Mr. Spangler continue.

21 In June 2018, our focus was to develop the
22 methodology and the methods, both, to conduct the
23 pedestrian on-the-ground survey.

24 At that time, what we -- what was proposed
25 to the tribes was, and I'm going to talk about it at

1 a high level, was to go out into the field, into the
2 projects at the project site, and visit the known
3 tribal cultural resources that had been identified
4 during the Class III investigations, archaeological
5 investigations, and the 2013 tribal cultural
6 resources.

7 So we would go and visit those known
8 sites, and we would gather the input from -- we would
9 go out with the tribes to visit those sites, those
10 tribal cultural resource sites, and gather the
11 information from the tribe about their significance to
12 the tribes that would -- you know, the participating
13 tribes.

14 We would also have the opportunity there
15 to visit and walk other areas of the project site
16 where ground disturbance would occur.

17 And those areas would be determined, along
18 with the tribe, which areas they would want to visit,
19 in addition to the known -- the areas where the known
20 tribal sites would be.

21 All that would be documented in site forms
22 and then we would evaluate the impacts on those tribal
23 sites, on that information, and then develop the
24 mitigation measures in coordination.

25 JUDGE FROEHLICH: And that timeframe, I'm

1 sorry to interrupt you, is in preparation for the June
2 2018?

3 MS. DIAZ-TORO: During the June 2018
4 meetings that we had --

5 JUDGE FROEHLICH: During. Okay.

6 MS. DIAZ-TORO: -- with the tribe.

7 JUDGE BOLLWERK: Do we need these exhibits
8 anymore? We still need them or?

9 JUDGE FROEHLICH: If everyone can remember
10 what the parenthetical and italics was focused on, we
11 can take it down.

12 MS. DIAZ-TORO: All right. Okay.

13 JUDGE FROEHLICH: They're available if we
14 need them.

15 MS. DIAZ-TORO: Thank you. So that was
16 the focus of the discussions during the June 2018. We
17 received -- or the tribe communicated to us, concerns
18 with that -- with those proposals back then,
19 specifically --

20 JUDGE FROEHLICH: Back then, at or during
21 the face-to-face meetings in June or --

22 MS. DIAZ-TORO: During the face-to-face
23 meetings in June and in communications afterwards,
24 that the proposals that we were discussing, that we
25 brought to the table, did not have scientific

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1 integrity.

2 And that's where the February 2019
3 proposed methodology comes into play, and now I can
4 certainly turn it over to Mr. Spangler to discuss that
5 part.

6 MR. SPANGLER: Thank you.

7 MS. BAER: Actually, Your Honor, if I may
8 jump in for one moment. I think there's been a little
9 bit of confusion about the March 2018 approach versus
10 the February 2019 methodology.

11 JUDGE FROEHLICH: Yes.

12 MS. BAER: The March 2018 approach was
13 included in Exhibit NRC-192.

14 JUDGE FROEHLICH: Right.

15 MS. BAER: That's the overarching
16 theoretical approach that consisted of the five
17 elements, including the site survey. The 2019
18 methodology, which is Exhibit NRC-214 --

19 MR. STILLS: Your Honor, if counsel is
20 going to testify, she should be sworn in, please.

21 JUDGE FROEHLICH: Overruled. Just let me
22 hear -- I want to -- she's describing the exhibits and
23 what they contain.

24 MR. STILLS: Okay.

25 JUDGE FROEHLICH: I don't think this is

1 testimony.

2 MR. STILLIS: Thank you. I just wanted to
3 raise an objection in due course, so thank you.

4 JUDGE FROEHLICH: Yes. So noted.
5 Continue please, Counsel.

6 MS. BAER: Thank you, Your Honor. Exhibit
7 NRC-214 is the proposed draft methodology to conduct
8 the site survey.

9 JUDGE FROEHLICH: Okay. Thank you for the
10 clarification. The witness, Spangler.

11 MR. SPANGLER: Thank you. If you'll
12 indulge me a little bit of history. When I came on to
13 this project, I was presented with a very complicated
14 history behind this and the issue of the lack of
15 scientific integrity.

16 And so the first thing I did is, I went
17 into what Dr. Nickens had done to identify those
18 deficiencies, and I was able to do so. It very much
19 lacked a scientific methodology. I mean, it was just
20 -- it wasn't structured correctly. It didn't have
21 definitions and it didn't have the protocols that we
22 expect in a scientific methodology.

23 And so that provided the framework for me
24 to go in and look at how others had done it. And I
25 started from the premise of, what do other federal

1 agencies use? If a federal agency is using a specific
2 approach, that agency has reasonably -- they've deemed
3 that approach reasonable.

4 And so when I went in to look at all these
5 different methodologies that I had access to, I
6 identified two methodologies that have been
7 implemented by federal agencies, and I compared those
8 two with the two that Dr. Nickens had preferred.

9 Dr. Nickens preferred the Stoffle. I'm
10 not sure of the exhibit number.

11 MS. DIAZ-TORO: 181.

12 MR. SPANGLER: NRC-181. And the Lebeau
13 methodology.

14 JUDGE BOLLWERK: That's NRC-206.

15 MR. SPANGLER: NRC-206. Thank you. So I
16 went in and looked at those two and I found LeBeau to
17 be very applicable to what we were doing, but I found
18 Stoffle's research is very good, but it's kind of an
19 older model. It's how things have been done
20 traditionally, and that's taking the tribal elders out
21 to a particular location and say, tell us what you
22 think about this. Why is this area important to you?
23 Where are your TCPs? How are they important?

24 It did not involve on-the-ground survey at
25 all. It involves taking individuals to a location and

1 interviewing them. It's very ethnographic in scope.

2 Well, the trend, as I discussed yesterday,
3 is more towards actual tribal engagement early in the
4 process on a landscape scale. And so I incorporated
5 the LeBeau methodology with Ball et al, NRC-184.

6 That approach has been used by the Bureau
7 of Oceanic Energy Management, it's not an acronym that
8 flows off the tongue real easily, and has since been
9 adopted by the Department of Interior as a recommended
10 guidance approach for these exact kinds of process.

11 So the LeBeau methodology has been used by
12 the Army Corps of Engineers, the Ball et al has been
13 used by Department of Interior. So I determined that
14 both of those approaches were reasonable, and by
15 merging them into one coherent approach, structured in
16 the -- you know, in a scientific methodology, was the
17 best approach we can hope for to resolve the NEPA
18 contention.

19 Now, I do want to emphasize that the
20 Section 106 process is closed as far as I can tell on
21 this. It's not an issue in this hearing, as much as
22 Dr. Morgan would like to see it reopened. I was
23 focused on the NEPA contention only.

24 JUDGE BOLLWERK: All right. Well, is the
25 Department of Interior document you're talking about,

1 or the incorporation of Ball, is that NRC-185? Is
2 that why that's in --

3 MR. SPANGLER: It's --

4 JUDGE BOLLWERK: Ball is 184. I'm talking
5 about 185, which is a Department of Interior graph.

6 MR. SPANGLER: Yes. 184 is, I think,
7 titled, Recommended Guidance, and then 185 is Odess,
8 and that's drafted guidance for Department of
9 Interior.

10 JUDGE BOLLWERK: Thank you.

11 JUDGE FROEHLICH: All right. With all
12 that as preview, what was the staff's approach, or
13 intent, to incorporate the tribal participation in the
14 methodology envisioned in the 2019 proposed
15 methodology?

16 How were we going to -- how were you
17 planning to engage the tribe to finalize, solidify,
18 identify the participants or the individuals who would
19 be involved in the pedestrian site survey, the oral
20 history from tribal elders, the input from other
21 tribes, how were you going to, sort of, put the 2019
22 proposed methodology, you know, into effect?

23 MS. DIAZ-TORO: So how we've been -- we
24 have been reaching out to the tribe, we have provided
25 proposals, we asked for their input, and we have been

1 listening to the tribe and incorporating into our
2 documents, both the March 2018 approach and the
3 February 2019 proposed methodology.

4 The fundamental aspects that the tribe has
5 identified are necessary to develop the reasonable
6 approach. Those fundamental components are identified
7 in the March 2018 approach and those are carried into
8 the methodology, which is one of the components of the
9 March 2018 approach.

10 We developed the methodology, we provided
11 the methodology to the tribe for review and comment,
12 we conducted meetings with them, we went to Pine Ridge
13 on February 22nd to have a face-to-face meeting, or to
14 participate in a meeting with the tribe's Advisory
15 Council.

16 And during the meetings and the responses
17 from the tribes with respect to the February 2019
18 proposed methodology, the tribe's assertions, and
19 responses, and concerns were focused on the March 2018
20 approach, on those components, the five or six
21 components, identified in the March 2018 approach.

22 And those specifically were that the
23 length of the survey was not appropriate or
24 sufficient, that the amount of the reimbursement and
25 honoraria was not sufficient, that the pedestrian site

1 survey, on-the-ground site survey, needed to cover the
2 entire 10,000 acres using 10-meter transects.

3 So they were -- their response was focused
4 on those components, which the NRC staff understood
5 had heavily negotiated with all the parties and
6 understood that all the parties were in agreement with
7 back in March 2018.

8 So that was -- those were the focus of the
9 discussions during the February meetings with the
10 tribes, with respect to those agreed upon parameters
11 from the March 2018 approach.

12 JUDGE FROEHLICH: So you were present at
13 the February 2019 meetings --

14 MS. DIAZ-TORO: Yes.

15 JUDGE FROEHLICH: -- as well as Mr.
16 Spangler.

17 MS. DIAZ-TORO: Yes.

18 JUDGE FROEHLICH: Dr. Morgan, were you
19 present?

20 DR. MORGAN: I was not present at that
21 meeting.

22 JUDGE FROEHLICH: Mr. White, you were
23 present.

24 MR. WHITE: Yes, I was present.

25 JUDGE FROEHLICH: Okay. Mr. White, what

1 was the perspective of the tribe going into those --
2 that meeting, or those meetings, that were scheduled
3 for February 2019?

4 MR. WHITE: So we had -- we did have some
5 initial issues with Mr. Spangler's view of traditional
6 landscapes. He missed one of the fundamental aspects
7 of our cosmology, as it relates to our origins.

8 And so we did point that out to him over
9 teleconference call and also provided him with some
10 literature for him to review. And then, of course,
11 going into the meetings, the LeBeau stuff was a big
12 issue with our THPOs, for a number of reasons, going
13 back into our history.

14 And so, you know, those issues were
15 definitely raised and as far as, you know, the
16 transects, that's one of the things that we wanted to
17 have to be able to go out to the site and to conduct
18 the pedestrian survey of the entire area, going back
19 through the scientific method, being able to repeat
20 what was done by previous tribes.

21 We wanted the ability to go out there and
22 survey the entire site. And so within the 2018
23 approach, those timeframes then become an issue. So,
24 you know, trying to box everything in within the 2018
25 approach is very difficult to do.

1 And so, you know, those things that we
2 talk about within our methodology that we did propose
3 back in June of 2018, a lot of those aspects weren't
4 fully addressed; only vaguely.

5 JUDGE FROEHLICH: Could you focus on the
6 issues, or the concerns, that were communicated, I
7 guess, in June of 2018 to the staff, and then I'd like
8 to see how or if the staff responded, the concerns
9 now, I guess, that you raised with them in the
10 meetings in June of 2018.

11 MR. WHITE: So some of the issues that we
12 felt were important and are important to us, are the
13 flora and fauna of the area, being able to look at
14 those plant species at different times through the
15 seasons, and that's one of the biggest things with
16 ethnobotanic research.

17 There's methods within there that use
18 sort methodologies that allow people to group plants
19 and animals together using language to be able to
20 identify and understand those areas better and more
21 clearly for Western science view.

22 And it also gives a better idea and
23 understanding of our Lakota world view. You know,
24 those things were a part of that, and those -- that
25 issue wasn't addressed fully as far as being able to

1 look at plants.

2 JUDGE FROEHLICH: Is that concern the
3 basis for the four times in a year desire to go to the
4 site? Is what you just said tied to the four visits?

5 MR. WHITE: Yes, four times a year and
6 also because of our cosmology, being able to go out
7 there and view the site in the evening time to look at
8 the cosmology and how it relates to the landscape is
9 also an important aspect.

10 JUDGE FROEHLICH: Okay. Were there any
11 other concerns that were raised in June of 2018 that
12 were communicated to the staff from the tribe's
13 perspective?

14 MR. WHITE: You know, we did talk about
15 the different groups of people within the tribe, our
16 societies, our elder groups, and also, grassroots
17 communities, our youth, you know, to be able to be a
18 part of it.

19 The newer research shows that being able
20 to have people at the table from the beginning of
21 project development is important for -- to be able to
22 have, you know, the best informed project methodology
23 when working with indigenous cultures.

24 JUDGE FROEHLICH: Any reaction, Ms. Diaz,
25 to the concerns, I guess, that Mr. White articulated

1 that were raised in the June 2018 meetings?

2 MS. DIAZ-TORO: So I would start, the NRC
3 has never limited the information that the tribe would
4 like to gather. In this instance, with respect to the
5 flora and the fauna. The site forms that have been
6 discussed with the tribes do elicit that information
7 as well.

8 In the February 2019 letter, that
9 information would also have been elicited when we go
10 out into the field, so that information has never been
11 limited or construed as not being -- if it's of
12 significance to them, we will certainly gather -- you
13 know, document the information with them.

14 With respect to the June 2018 proposal
15 that was provided to the NRC staff when the NRC staff
16 was at Pine Ridge, at that time, the NRC was not aware
17 that that proposal was being developed.

18 It was provided to us, you know,
19 unbeknownst to us, at the end of the second day of the
20 meetings. I think it was on June 12th of 2018. On
21 Wednesday, June the 13th, we were -- the NRC and -- it
22 was Dr. Nickens and I then, were invited to attend a
23 meeting of the tribe's Advisory Council, and we went
24 to the meeting and answered the questions.

25 In the June 2018 methodology, proposal, I

1 apologize, from the tribe, cosmology part was in
2 there. The different individuals from the tribe, and
3 groups from the tribe, that Mr. White just talked, was
4 included in there.

5 When you look at the proposal and put it
6 into the context, there were significant differences,
7 and fundamental differences, between the June 2018
8 proposal and the, you know, reasonable agreed upon
9 parameters.

10 JUDGE FROEHLICH: Does --

11 MS. DIAZ-TORO: The proposal would take
12 over a year to complete. It would take several dozens
13 of individuals. It would go beyond the geographic
14 scope of the site. Nonetheless, when we were
15 developing the 2009 proposed methodology, we did take
16 a look at the June 2018 proposal and we did try to
17 bring and incorporate certain aspects.

18 The objectives that were documented in
19 that June 2018 proposal, the tribe wanted to make sure
20 that we document the eligibility determinations and
21 that's why eligibility determinations, even though
22 it's a Section 106 matter, is also incorporated into
23 the 2019 proposed methodology, so we did look at
24 certain aspects of the June 2018 approach that we
25 would -- that we incorporated within the agreed -- you

1 know, the reasonable agreed upon parameters of the
2 March 2018 approach.

3 JUDGE BARNETT: Can I follow-up?

4 JUDGE FROEHLICH: Sure.

5 JUDGE BARNETT: Mr. White, you mentioned
6 the seasonal thing, so in your vision, this was going
7 to take a year to implement, is that correct?

8 MR. WHITE: Yes, it would take
9 approximately a year, you know, to maybe a year and a
10 half after that last season to be able to finish up
11 with the reporting on that final season.

12 You know, I understand, you know, this
13 type of work, you know, takes some time to complete,
14 you know, as research projects often do. You know,
15 one of the biggest issues that we had with March 2018
16 approach was, there was nothing given to us.

17 And so that's why we had Quality Services
18 accompany us in June to develop those aspects of that
19 methodology that we then presented to the NRC and Dr.
20 Nickens.

21 JUDGE BARNETT: So the March 2018 approach
22 did not have a timeline that was a year long. It did
23 have some timelines in there, it was several months,
24 I don't remember exactly --

25 MR. WHITE: Yes, I believe it --

1 JUDGE BARNETT: -- so you did not think
2 that was tenable?

3 MR. WHITE: No, we were given two two-week
4 periods within the same season to go out there to the
5 site, to return to the sites that were previously
6 identified, as a, what they term, open site survey,
7 which I understand isn't even something that's done in
8 the field.

9 And so, you know, we did have concerns
10 with that.

11 JUDGE BARNETT: You thought the March 2018
12 approach was unreasonable, is that correct?

13 MR. WHITE: We felt that the timelines
14 within there were unreasonable with what was important
15 to us.

16 JUDGE BARNETT: Thank you.

17 DR. MORGAN: May I follow-up?

18 JUDGE BARNETT: Yes.

19 DR. MORGAN: In reference to the two two-
20 week on-the-ground survey method, and the open survey,
21 we've been discussing the strict scientific
22 methodology and method to be used and no
23 archaeological or TCP survey could be done in an open
24 survey.

25 You would not be able to take that report

1 that's written and submit it to a SHPO, and have that
2 SHPO, in any state, accept it, because you didn't
3 follow a scientific method. You didn't do the
4 transects. You didn't document your transects, so --
5 but I think Mr. Spangler would agree with me, I would,
6 that in -- it's just very unreasonable to try and
7 cover the amount of area, whether it's -- what is it,
8 the 2600 acres, plus acres, you cannot accomplish that
9 and do it in a way that is professionally done.

10 It's just not doable. And if you're
11 looking at both the direct and indirect impacts, and
12 future use of the area, would not want to do the full
13 10,000-plus acres?

14 And so the two two-week survey is not
15 reasonable and if I heard you correctly, when you said
16 that your -- you brought the methodology to the tribe,
17 and that -- you know, what Mr. White said -- in terms
18 of starting at the scope, beginning of the scoping
19 period, is where input should be drawn upon and not
20 after you've already developed a product.

21 And I heard you, you know, saying that
22 you're going to go back and you're going to cover the
23 exact area that the tribes did in 2013, 2012, 2013,
24 why would you agree to that?

25 Should this not be on their terms in terms

1 of going out and doing the survey per their way of
2 doing things? So --

3 MR. SPANGLER: Can I just respond quickly?

4 JUDGE FROEHLICH: Sure.

5 MR. SPANGLER: I just want to clarify what
6 Dr. Morgan says about SHPOs rejecting any project that
7 doesn't use transects as scientific methodology,
8 that's true for archaeological surveys, but it's not
9 true for TCPs.

10 TCPs are recognized as such because the
11 tribes identify them as such, and there is no
12 scientific requirement for a TCP designation.

13 DR. MORGAN: I would like to follow-up on
14 that. If you are to do a survey using a methodology,
15 using methods, you are to follow something that would
16 be accepted by the SHPO. I don't see a SHPO accepting
17 a report that doesn't have very specific transects.

18 And so -- and we're not talking about the
19 oral stories. That's another component of it. We're
20 talking about the -- you want GIS documentation of
21 this project, then it's going to have to pass the SHPO
22 standards.

23 MR. WHITE: And that is the practice of
24 the Oglala Sioux tribe within our reservation
25 boundaries.

1 JUDGE FROEHLICH: Okay. I wanted to
2 follow-up with you, Mr. White, and that deals with the
3 time, I guess, you had to consider the March 2018
4 approach. Is it correct that you received that
5 approach by letter on March 16th, I think NRC Exhibit
6 192 is the transmittal, so you would have received the
7 March 2018 approach in March, and I guess, the
8 meetings and the follow-up was to take place in June.
9 Do I have that time right; timescale right?

10 MR. WHITE: Yes, it is.

11 JUDGE FROEHLICH: And were there
12 communications between the staff and the tribe after
13 you received their 2018 approach, where you, you know,
14 gave them some reaction to it or expressed any
15 concerns with it?

16 MR. WHITE: Yes, there were webinars where
17 our attorneys did raise those issues as far as the --
18 what was being proposed by Dr. Nickens. We didn't
19 really have the best chance to look at it. I did
20 explain to you the size of our office.

21 And so Dr. Nickens came in June with the
22 one-pager and a map. And that was, you know, what we
23 had to work with. And so those issues were raised as
24 far as the methodology that he had put together.

25 MS. DIAZ-TORO: Your Honor?

1 JUDGE FROEHLICH: Yes.

2 MS. DIAZ-TORO: So when we developed -- I
3 just wanted to provide additional information, we did
4 develop -- the proposed March 2018 approach was
5 submitted to the tribe in December of 2017. And then
6 we elicited input from the tribe and based on that
7 input that we received from the tribe between December
8 of 2017 and March 2018, we finalized and memorialized
9 it in the, what we call the, March 2018 approach,
10 based on the comments and the assertions that it was
11 a reasonable approach.

12 JUDGE FROEHLICH: I guess in that -- in
13 those correspondence, was there, you know, reference
14 to the different seasons, the cosmology, or the
15 various groups within the tribe, concerns that Mr.
16 White articulated?

17 JUDGE BOLLWERK: So I think what she's
18 referring to is NRC-193. That was the response
19 originally from the tribe relative to -- and for
20 instance, there's a statement toward the end, this was
21 from Trina Lone Hill, who I know is not, obviously,
22 involved anymore, basically saying things like,
23 "Lastly, the proposed timeline presented by the NRC
24 staff appears achievable."

25 So the question is, what does that mean

1 now? Is Trina Lone Hill speaking out of turn or has
2 something else transpired that the two weeks, or the
3 four weeks that were considered then, isn't
4 sufficient, and what's changed?

5 JUDGE FROEHLICH: That's a good question.
6 Mr. White?

7 MR. WHITE: So Ms. Lone Hill left in early
8 2018 and as I said yesterday, I then became the acting
9 THPO during this time. And also, as the director
10 which oversaw the Cultural Affairs Office.

11 I looked over the document and I did not
12 feel comfortable with what was agreed to by the
13 previous THPO. There were things I definitely felt
14 uncomfortable with as far as the scientific method not
15 being able to have some repeatable, where we would be
16 able to go out to the site and look at the entire
17 site.

18 You know, going back to the open site
19 survey, that's something that I'm not familiar with,
20 and so, you know, we did have to raise those issues,
21 and we did on those webinars, whenever I became a part
22 of those conversations.

23 JUDGE BOLLWERK: So something did change.
24 In other words, what, I guess, and I should mention
25 that, I mean, at least I think the Board's -- go

1 ahead, Judge. I mean, you're shaking your head.

2 JUDGE FROEHLICH: I think I know where
3 you're going.

4 JUDGE BOLLWERK: I mean, I think the
5 Board's perception was that there was general
6 agreement among the parties, given what we were
7 seeing, and there does not appear to be general
8 agreement among the parties at this point.

9 And that seems to have been -- by June
10 2018, that seems to have come to the forefront. And
11 I guess one of the things we have to deal with in this
12 case is the fact there seems to have been a change in
13 approach by the tribe. And it was not something that
14 was insignificant in any event -- in any respect.

15 So I think that's what you're telling us,
16 there was a change in approach by the tribe.

17 MR. WHITE: As far as the approach went,
18 we did put together the methodology and we were
19 prepared to go out to the site to begin surveying
20 those areas, you know, the project area, and so we did
21 have our five people that we were allotted to go out
22 to the area, and the NRC then walked.

23 JUDGE FROEHLICH: This is the week of June
24 11th you're referring to?

25 MR. WHITE: Yes.

1 JUDGE FROEHLICH: So when, I guess, the
2 staff came to Pine Ridge, you're saying that the tribe
3 was ready to walk the grounds that, I guess, one day,
4 the following Monday, under the originally proposed
5 timeline?

6 MR. WHITE: Yes, we did have -- we had our
7 Quality Services there, we were going to utilize their
8 expertise to assist in the pedestrian survey. Dr.
9 Nickens did have his interns out there flagging some
10 areas for us to help us locate those areas easier, and
11 so we never got to that point.

12 JUDGE FROEHLICH: Those five people that
13 you just mentioned, those people were approved by the
14 Council, or the group, that mentioned yesterday that
15 would be responsible for selecting the appropriate
16 tribal members?

17 MR. WHITE: Yes, we did meet with -- we
18 did have a meeting with NRC staff and the Advisory
19 Council, and QSI was there as well, and that's what
20 was talked about.

21 JUDGE BOLLWERK: You mentioned Quality
22 Services was there, who was paying for their service;
23 for their time?

24 MR. WHITE: We paid for Quality Services'
25 time.

1 JUDGE FROEHLICH: In preparation for, I
2 guess, that would have been Monday morning visit to
3 the site, who was there from the NRC staff or its then
4 contractor?

5 MS. DIAZ-TORO: It was myself, Dr.
6 Nickens, and then two graduate students from the
7 University of Arizona, but they were not representing
8 the University of Arizona. They were employees of
9 SC&A, just like Dr. Nickens was like associates of
10 SC&A, just like Mr. Spangler.

11 The individuals, the two individuals, that
12 were there, they were gathering GIS data to look --
13 you know, to have the exact coordinates of the known
14 tribal cultural site surveys, that had been identified
15 in previous surveys, to facilitate going out to the
16 field, and --

17 JUDGE FROEHLICH: Okay. So we had at
18 least four members of the NRC staff, or its
19 contractor, and we had five members of the -- that
20 were approved by the tribe, who were ready to go out
21 Monday morning, and I guess, what was the plan from
22 the staff as to how they would conduct the onsite
23 survey, or walk, for that Monday with the people who
24 were assembled there?

25 MS. DIAZ-TORO: So our understanding was

1 that the tribe did not accept the proposals from Dr.
2 Nickens, that they had concerns about it, and they did
3 not want to use that, so our understanding was that we
4 were not to go out to the field without an agreed upon
5 methodology, that we had no methodology, because they
6 rejected the proposal from Dr. Nickens.

7 And so our understanding was that we were
8 not going to go out in the field when -- it was a
9 surprise to us that they were closer to the end of the
10 week of June 11th, that they indicated to us that they
11 were ready to go out in the field, but yet, we had no
12 methodology to go out in the field because they had
13 rejected Dr. Nickens' proposals.

14 JUDGE FROEHLICH: And the meetings, the
15 face-to-face meetings, at Pine Ridge, that was to come
16 up with a methodology for the site survey the
17 following week, is that --

18 MS. DIAZ-TORO: Correct.

19 JUDGE FROEHLICH: That's correct? And I
20 think I read in one of the things that the staff and
21 the tribe was going through the proposed methodology
22 and there were a number of numbered elements, or
23 steps, that were covered, and then there were other
24 elements that weren't reached or weren't addressed.

25 Sorry if I don't remember, I think there

1 were seven elements, I guess, that were discussed
2 among the tribe and the staff, and then the next
3 element, I think the eighth element in that chart, was
4 the methodology to be used.

5 Tell me about that process and why they
6 didn't get to the methodology portion so that they
7 would be prepared for the site visit or inspection the
8 following Monday.

9 MS. BAER: Your Honor, could you clarify
10 if you're asking about June of 2018 or February of
11 2019, which face-to-face meeting?

12 JUDGE FROEHLICH: I believe this is 2018,
13 but if Ms. Toro can correct me -- I'm sorry, Ms. Diaz
14 can correct me, please do.

15 MS. DIAZ-TORO: So I am talking about June
16 2018.

17 JUDGE FROEHLICH: 2018.

18 MS. DIAZ-TORO: And so the week before,
19 I'm sorry, I don't have a calendar, I apologize, but
20 the week before June -- the prior week to June 11th,
21 we had, I think, three teleconference calls with the
22 tribe to discuss the proposal from Dr. Nickens.

23 We were prepared to go out to the field on
24 June 11th and we received notification from the tribe
25 that we should not go out to the field, that we should

1 stop, and that we should go and they invited to go and
2 meet with them at Pine Ridge during the week of June
3 11th, and to -- invited us to participate in a meeting
4 with their Advisory Council on Wednesday, June 13th.

5 So we proceeded in that manner, and when
6 we went to Pine Ridge, we continued to discuss the
7 proposals from Dr. Nickens, which the tribe
8 communicated to us, had significant concerns and did
9 not want to use that methodology.

10 So we were -- our understanding, the NRC
11 staff's understanding, based on the response from the
12 tribe about the significant concerns with respect to
13 the proposal from -- the methodology proposal from Dr.
14 Nickens, was that we were not ready to go out on the
15 next morning, June 28th -- June 18th of 2018.

16 JUDGE FROEHLICH: Okay. And is your
17 counsel correct that the discussion of some document
18 that led up to a methodology was in the subsequent
19 meeting in 2019?

20 MS. DIAZ-TORO: I'm sorry, I'm not sure
21 which document you're --

22 MS. BAER: I heard you reference a Section
23 8.

24 JUDGE FROEHLICH: Right.

25 MS. BAER: And I believe that's -- when

1 you're talking about a Section 8 titled, Methodology

2 --

3 JUDGE FROEHLICH: Right.

4 MS. BAER: -- that's NRC Exhibit, I think,
5 214, the methodology from February of 2019.

6 JUDGE FROEHLICH: That's February '19.

7 MS. BAER: Yes.

8 JUDGE FROEHLICH: Thank you for
9 straightening it out. I was --

10 MS. DIAZ-TORO: So yes, Section 8 is the
11 February 2019 methodology and I'm sorry if it escapes
12 the number. Exhibit number.

13 JUDGE FROEHLICH: Okay. But that's in
14 2019.

15 JUDGE BOLLWERK: So just to be clear, it's
16 your testimony that you did not go out because you
17 were directed by the tribe not to start or because you
18 felt that because of what the tribe had done, it was
19 not useful or practical to start?

20 MS. DIAZ-TORO: So for June, going into
21 the field on June 11th --

22 JUDGE BOLLWERK: June, right, and that's
23 what we're talking -- and June 2018, that's what we're
24 talking about.

25 MS. DIAZ-TORO: So June 11th was a Monday,

1 and that was, in the timeline, the first -- the
2 timeline for the March 2018 approach. That was the --
3 would have been the first day of the field visit of
4 the site survey, right?

5 I'm not sure if it was the Thursday -- I
6 think it was maybe the Thursday before Monday, June
7 11, 2018, it might have been Friday, I can't recall
8 exactly, but either one of those two days, the NRC
9 communicated to the tribe that we were going to
10 proceed with the site survey on Monday, June 11th, and
11 we received notification from the tribe that we should
12 not go out to the field to start the field survey, and
13 instead, the tribe proposed to continue discussions on
14 Monday, June 11, 2018 at the Pine Ridge reservation.

15 Subsequent to that, we -- the tribe
16 communicated its significant concerns, that Mr. White
17 talked about -- not subsequent, I should say, during
18 the week of June 11th, so between June 11th of 2018
19 and June 13 of 2018, the tribe communicated the
20 concerns that they had about the methodology proposed
21 by Dr. Nickens, and provided to the NRC staff, its own
22 survey proposal, which is the June 2018 proposal from
23 the Oglala Sioux Tribe.

24 It was provided on June 12th and then it
25 was updated and provided again to the NRC staff on

1 June -- on Friday, June 15th of 2018.

2 JUDGE FROEHLICH: And just for
3 clarification, that's the non-public document NRC-198
4 that you referred to in your prepared testimony, NRC-
5 176-R at Question 23 on Page 18?

6 JUDGE BOLLWERK: As well as NRC-197, which
7 was the first one.

8 MS. DIAZ-TORO: It's 197 and 198.

9 JUDGE BOLLWERK: Right.

10 JUDGE FROEHLICH: Okay. Yes. Thank you.

11 MS. DIAZ-TORO: So based on the
12 information gathered in the document provided to us on
13 June 12th and then updated on June 15th, which was the
14 Friday, and this rejection of the Dr. Nickens
15 proposals, the NRC staff's understanding was that we
16 were not ready to go on June -- on Monday, June 18th
17 of 2018, to the site.

18 JUDGE BOLLWERK: So it was your decision
19 then not to come out.

20 MS. DIAZ-TORO: It was.

21 JUDGE BOLLWERK: All right. And, Mr.
22 White, is that your -- is that an accurate reflection
23 of what happened or is there anything you want to add?

24 MR. WHITE: You know, I think the
25 important thing that we want to discuss is the

1 methodology, the, how we're going to be out in the
2 field. We repeatedly had raised the concerns about
3 the open site. Nothing was changed within there;
4 within our concerns.

5 So we did incorporate that into that
6 methodology. As far as the other aspects, those
7 things could have been hashed out throughout the other
8 phases within that approach.

9 And so, yes, we do feel -- we did feel
10 like we were able to go out there and walk the area.

11 JUDGE BOLLWERK: So you felt you were,
12 from your perspective, at least you were prepared to
13 implement that part of the methodology. I have to be
14 careful about using that word, or that method, in any
15 event, because you had Quality Services and you were
16 ready to start the site.

17 You felt you were ready to start walking
18 the site, essentially.

19 MR. WHITE: Yes.

20 JUDGE BOLLWERK: Okay.

21 JUDGE FROEHLICH: And I guess, in that
22 readiness to walk the site, what was the approach that
23 Quality Services would prefer or would have you
24 conduct, or in what manner would they make this visit
25 to the site one that would be, you know,

1 scientifically valid or legitimate to the tribe?

2 MR. WHITE: So it was -- it came down to
3 the transects. Typically, we do 3 or 5-meter
4 transects, but because of the time constraints, I
5 believe we were going to do 9-meter transects within
6 there to be able to cover as much ground as possible
7 within those weeks.

8 JUDGE FROEHLICH: There were five
9 individuals, or five crews, I guess, and working at 9-
10 meter transects, how much territory could they cover
11 in two weeks?

12 JUDGE BOLLWERK: We're talking about five
13 individuals, right, not five crews; five individuals.

14 JUDGE FROEHLICH: Well, five individuals,
15 I guess, who would be paired with staff people? I
16 mean -- well, explain to me what Quality Services and
17 the tribe, you know, was ready to do on that Monday
18 the 18th, had that gone forward.

19 MR. WHITE: Yes, so it would have been our
20 five people, plus whatever the -- I believe it would
21 have been Nickens and the two other people, so eight
22 people covering, you know, 9-meter transects.

23 You know, it's hard for me to say because
24 Quality Services isn't here. They're the experts and
25 that's why we brought them in.

1 JUDGE BOLLWERK: Okay. And the five --
2 just so I'm clear, the five people that were going to
3 be doing the transects, were they Quality Services
4 folks or were they folks that you were -- Quality
5 Services was sort of overseeing it and you were
6 actually -- it was tribal members that were actually
7 going to be doing the walking?

8 MR. WHITE: It was going to be Quality
9 Services. They have the training, they have the
10 tribal members who are trained --

11 JUDGE BOLLWERK: All right.

12 MR. WHITE: -- to do that.

13 JUDGE BOLLWERK: Okay. Maybe we should
14 talk about transects for a second. So you're talking
15 about a 9-meter transects. I guess we've also heard
16 about 10-meter transects. Let me refer you to another
17 couple of documents.

18 I'd like to take a look at what the Board
19 has marked as Exhibit 3, Board 3, and also, a document
20 that goes back to the last case, which is NRC-23.
21 These are both Applicant prepared documents. They're
22 not documents prepared by the staff or by the tribe.

23 And they have some information and again,
24 I think Ms. Diaz mentioned these earlier. I believe
25 NRC-23 references, it would be a document that was

1 prepared by Powertech at the staff's request back in
2 2012.

3 MS. DIAZ-TORO: I'm sorry. Can I ask a
4 clarifying question on the --

5 JUDGE BOLLWERK: Sure.

6 MS. DIAZ-TORO: Maybe I'm confused a
7 little bit, because it says -- I'm sorry, I just -- if
8 I'm confusing, just if I could seek clarification
9 about this document.

10 JUDGE BOLLWERK: Yes.

11 MS. DIAZ-TORO: The title of the document
12 that I have in BRD-003, Strata Energy, Inc., Ross ISR
13 Project, but the --

14 JUDGE BOLLWERK: Right. One's a Strata
15 document, one's a Powertech document.

16 MS. DIAZ-TORO: Oh, and that was --

17 JUDGE BOLLWERK: Got confused.

18 MS. DIAZ-TORO: -- NRC-023. Okay. Thank
19 you. I apologize.

20 JUDGE BOLLWERK: Hold on, 023 is a -- not
21 a problem.

22 MS. DIAZ-TORO: I was a little bit
23 confused.

24 JUDGE BOLLWERK: We all got to be on the
25 same page here.

1 MS. DIAZ-TORO: Thanks, Your Honor.

2 JUDGE BOLLWERK: It's very important. So
3 as you pointed out, 23 is a Powertech document and I
4 believe it was generated in the course of the
5 activities you talked about that happened in 2012.

6 MS. DIAZ-TORO: Yes.

7 JUDGE BOLLWERK: You mentioned earlier
8 this morning.

9 MS. DIAZ-TORO: Yes.

10 JUDGE BOLLWERK: And the Strata document,
11 obviously, was not part of this case, but I believe
12 that if you look back at the, which is Board, let me
13 get the right number here, 002, there was a similar
14 thing going on in the Strata case where they were also
15 trying to get information and you want to take a break
16 at this point?

17 Okay. Let me just continue on here, I
18 agree with you, it's probably about time, so if you
19 look at these two documents, and these are prepared,
20 again, by the Applicant.

21 If you look down on NRC-023, down at
22 Footnote 2, it's got assumptions in there, and it
23 says, "The archaeological survey of the project area,
24 using 30-meter intervals between surveyors, generally
25 covered approximately 22 acres per person day,

1 depending on the terrain, the ground cover, and the
2 number of archaeological sites that we encountered,
3 site recordation to meet state and federal standards
4 can be quite time-consuming.", excuse me.

5 "The level of effort stipulated in this
6 scope of work", and this is an estimate, this is what
7 CRM firms do, in fact, I suspect, so they can know how
8 they're going to charge people, "anticipates a
9 coverage rate of 15 acres per person day."

10 And I'm assuming that's probably
11 approximately an eight-hour day. So that's talking
12 about 30-meter intervals, which they're going to say
13 is 15 acres a day, even though it might be -- it could
14 say 22.

15 If you look at the Strata document, which
16 is Board-003, down on Page 2, in Section 3,
17 Assumptions, it says, "Strata assumes that 20-meter
18 interval survey transects will be used by the
19 interested tribes at 20-meter intervals. The level of
20 effort calculations in this scope of work assume a
21 coverage rate of 15 acres per person day."

22 So we have at least -- well, one's talking
23 about a 20-meter transect and one's talking about a
24 30-meter transect, they're nonetheless talking about
25 15 person meters per day. I'm sorry, 15 acres per

1 person per day.

2 So let me then turn to who can answer this
3 question, Dr. Spangler -- Mr. Spangler or Dr. Morgan,
4 these seem reasonable estimates?

5 MR. SPANGLER: The amount of coverage per
6 day depends, in large part, on the density of sites;
7 how often the crews are stopping to document a site.
8 There are specific protocols that are followed any
9 time a site is encountered.

10 If you're in a high-density area, you
11 might not get to 15 acres. If you're in a low density
12 area, it's not uncommon for archaeological crews to go
13 30 to 40 acres per crew member, but it really depends
14 on what you're finding on the ground.

15 But I would say it's a reasonable
16 estimate.

17 JUDGE BOLLWERK: I mean, CRM firms have to
18 use these types of figures to figure out what they're
19 going to give you as an estimate, right?

20 MR. SPANGLER: And they have very
21 interesting calculations that they use to arrive at
22 those estimates.

23 JUDGE BOLLWERK: But I hear you say anyway
24 that given -- this is not unreasonable. It's
25 certainly with their scope.

1 MR. SPANGLER: It's not unreasonable.

2 JUDGE BOLLWERK: Dr. Morgan, anything you
3 want to add in that regard?

4 DR. MORGAN: I would agree that the
5 density of sites in an area, the high density of sites
6 in an area, depending on that, yes, and the number of
7 crew members you have, yes, and also, the ground
8 surface's ability, and the terrain.

9 There's a number of factors and I would
10 agree that there's -- each CRM company has a formula
11 that they use and it is, oftentimes, very interesting
12 to see how they arrive at that.

13 And so -- and it depends, also, on the
14 crew, how many -- you know, you have a crew chief, and
15 who's the field techs, how experienced they are, and
16 the level of experience of the crew chief, for that
17 matter, so it depends.

18 JUDGE BOLLWERK: It depends on how you
19 carry it out, but in terms of making an estimate, at
20 least, as Mr. Spangler said, this is not an
21 unreasonable estimate, whether you're talking -- let's
22 say we're talking about 20-meter transects, this is --

23 DR. MORGAN: No.

24 JUDGE BOLLWERK: Yes, no?

25 DR. MORGAN: It is reasonable.

1 JUDGE BOLLWERK: Okay. Thank you. Let's
2 take our break here.

3 JUDGE FROEHLICH: Yes, I think that's a
4 good idea. Why don't we take a ten-minute break and
5 pickup from there.

6 (Whereupon, the above-entitled matter
7 went off the record at 10:38 a.m. and resumed at
8 10:52 a.m.)

9 JUDGE FROEHLICH: Let's begin.

10 JUDGE BOLLWERK: All right. Just a couple
11 other things about transects and then we'll move to a
12 different topic. So we talked before about -- we were
13 talking about a 20-meter transect. Obviously, if
14 you're going to use a 10-meter or a 9-meter transect,
15 it's going to take you longer to cover that -- well,
16 you're not going to get 15, let me make sure I get
17 this right, acres per person per day, you're not going
18 to get 15, you're going to get, well, we're only going
19 to get 7-1/2 or 10, I don't know.

20 Anything you want to say about that in
21 terms of what might be a reasonable general estimate?
22 Mr. Spangler, we'll start with you.

23 MR. SPANGLER: Yes, anytime you narrow the
24 transects, you increase the amount of walking that's
25 involved, and it will require more time to laterally

1 move across your project area.

2 The idea of transects is to make sure that
3 you've got a complete ground coverage and the South
4 Dakota standard is 30 meters. It really depends on
5 ground visibility. If the ground is open and clear,
6 you can widen the transects. If it's covered with
7 vegetation and you're not getting a good view of the
8 ground, it's necessary to close them.

9 JUDGE BOLLWERK: Thank you. So again, at
10 10 meters, anything -- we get 15 acres per person per
11 day at 20 meters, I'm sorry, at 20-meter transects,
12 anything you want to say about 10-meter transects?

13 MR. SPANGLER: It would take a lot longer.

14 JUDGE BOLLWERK: A lot longer. All right.
15 Dr. Morgan.

16 DR. MORGAN: Again, it depends on the
17 ground surface visibility, the GSV, and the standard
18 is, in South Dakota, as it is in North Dakota, with
19 CRM firms and a SHPO, that it is generally 30 meters.
20 And that is dependent upon the ground surface
21 visibility.

22 And you would narrow them if the ground
23 surface visibility is not clear or if you've come upon
24 a site, and you've recorded it, and you have, after
25 recording it, if you found one site, well, are there

1 other sites; are there more sites?

2 What is the density of the sites will
3 depend upon how wide you do your transects for a CRM
4 company. TCP companies do it differently. Their
5 transects, per their profession, are narrower.

6 JUDGE BOLLWERK: All right. Anything you
7 want to say about that, Mr. Spangler?

8 MR. SPANGLER: No.

9 JUDGE BOLLWERK: All right. So if my math
10 is right, if we're talking about a 10,000-acre site,
11 at 15 acres per person per day, it would take an
12 individual 667 days to cover the site.

13 Now, obviously, you're not -- that's full
14 employment for one person, but you're going to use a
15 crew, and I think that's what we've heard here
16 already, so I think I've got everything I wanted to
17 find out about that. Do you want to move to a
18 different subject?

19 It's not really transects, it's the
20 coverage of the site, actually. You want to cover
21 that now?

22 JUDGE FROEHLICH: Let's talk coverage.

23 JUDGE BOLLWERK: All right. Let's do that
24 then very quickly. So let me switch gears here and so
25 the -- we know from the -- and maybe if Andy Welkie,

1 if you'd be kind enough, could you put up Board-001?

2 And the reason we put this in was simply,
3 there's actually, as the title indicates, one very
4 similar to a diagram like this, very similar to it in
5 the staff's environmental impact statement, but it's
6 not in color. This one is easier to look at a little
7 bit.

8 The difference with the one in the staff's
9 environmental impact statement is, it's got a couple
10 -- it's got the Dewey area and the Burdock area
11 labeled, and also, I think it shows the central
12 processing facility, it's got a label, and also, the
13 satellite processing facility.

14 I think the central one is down to the
15 southeast and the satellite is up to the northwest, if
16 I got the directions right.

17 And so one of the questions has been, to
18 the degree, this is the whole Dewey-Burdock site, what
19 portions of this site are you going to cover?

20 And we know from the record, hold on, if
21 I can find the right page here. That's not it. Hold
22 on. Almost there. I apologize. I thought we were
23 going to go to a different subject than this one and
24 I'm not using our time efficiently here.

25 Okay. So the entire projected area of the

1 site is 10,580 acres, and that's from the supplemental
2 staff environmental impact statement, which is NRC-
3 001-A1 at Pages XXX and also Pages -- and Page 2-1.

4 Whereas the area of potential effect, or
5 impact associated with facility construction is 2637
6 acres, and that, again, the same document would be at
7 Page 3-75. So we've sort of had those two figures
8 that -- and I think we've heard from the tribe, their
9 preference would be to do the entire site; the whole
10 10,580 acres, is that correct, Mr. White?

11 MR. WHITE: Yes, it is.

12 JUDGE BOLLWERK: And in that same SGEIS,
13 at Page 1-24, it noted that for the original 2013
14 tribal survey, this was the one that was done by, I
15 believe it was five other tribes, I may have the
16 number wrong, basically, the SGEIS says that, "Tribal
17 representatives were encouraged to focus survey
18 efforts on portions of the proposed license area that
19 would be physically disturbed by the project, but
20 participants were permitted to access the entire
21 project boundary within the allowable time."

22 And I believe the timeframe, if I recall,
23 was it two weeks?

24 MS. DIAZ-TORO: I think it was -- I want
25 to say it was four weeks.

1 JUDGE BOLLWERK: Four weeks? Well,
2 whatever the timeframe was, basically, as much as they
3 could see in that time period, they were allowed
4 access to the entire site, although, this obviously
5 indicates that they were -- that the preference being
6 expressed was that they focus on the APE, probably,
7 the area of potential effect or impact.

8 MS. DIAZ-TORO: Yes. And they did use,
9 also, transects during that. It was seven tribes,
10 Your Honor.

11 JUDGE BOLLWERK: Seven? Okay. Also, the
12 March 2018 approach indicates, and this is NRC-214 and
13 15, that, "Access to the entire project area will be
14 provided, however, in an effort to carry out an
15 effective and efficient field survey within two-week
16 periods, tribal representatives are encouraged to
17 focus their field survey effort on those portions of
18 the license area that would be potentially disturbed
19 by project construction and operations, i.e., based on
20 the likelihood of potential effects."

21 So again, I think it's basically the same
22 -- sounds like the same, probably the part was
23 instructions, but the same guidance was being given
24 with respect to the original survey and to this one as
25 well.

1 MS. DIAZ-TORO: The focused areas would be
2 ground disturbance areas, yes.

3 JUDGE BOLLWERK: Right. Okay. And I
4 would also mention that the SGEIS at the -- at 1-22,
5 defines the area of potential effect as, "The area in
6 which properties of cultural significance may be
7 affected by the undertaking, including direct effects
8 such as disruption, damage, or alteration of all or
9 any part of the property, and indirect effects, such
10 as visual, audible, and atmospheric changes that
11 affect the character or setting in the property."

12 And I should mention on here, and one of
13 the things that's indicated on this particular diagram
14 is, there's purple areas and -- there's a light-blue
15 area, there's a purple area, and then there is sort of
16 an orange-ish or brownish area, and the brownish area
17 would be impacted if the -- if Dewey-Burdock had
18 decided to do a deep disposal well, an option to do
19 that would say, subsequently abandoned or decided not
20 to do.

21 So really, the APE for this purpose is the
22 purple area -- I'm sorry, is the light-brown area.

23 MS. DIAZ-TORO: Your Honor, I can't
24 confirm whether Powertech did abandon the deep-well
25 disposal. I don't recall. I know that their

1 Powertech person's here, but I am not one to confirm
2 or I can't recall.

3 JUDGE BOLLWERK: I don't think that's on
4 the table at this point. That's my recollection.

5 JUDGE FROEHLICH: I think it was another
6 special permit and they weren't going forward.

7 JUDGE BOLLWERK: That was my recollection,
8 but maybe -- we don't want counsel to testify, but if
9 he can say something that's not controversial. I
10 don't know.

11 MR. PUGSLEY: I hope it's not
12 controversial. No, deep disposal well option, Your
13 Honor, is on the table. It's an option that was
14 evaluated and it's still on the table.

15 JUDGE BOLLWERK: Okay. Well, again, that
16 -- the area in the deep-well disposal would become
17 important if Powertech decided to exercise that
18 option. Okay. So given all that, I guess what I'm
19 interested in knowing, first, from Mr. Spangler, is,
20 how did the staff contemplate that the survey would be
21 conducted?

22 And couple things, would the previously
23 identified sites be flagged either physically or using
24 GPS coordinates to avoid duplication?

25 MR. SPANGLER: No, the tribes would be

1 allowed to revisit previously recorded sites and there
2 would be no limits placed on the tribe as to the areas
3 that they would be allowed to visit.

4 JUDGE BOLLWERK: But would they be marked
5 so that they would know what they were and could say,
6 well, maybe we don't want to -- given we have a -- we
7 want to be efficient, these have already been marked,
8 they're already part of the environmental impact
9 statement, we'll --

10 MR. SPANGLER: They would be flagged --

11 JUDGE BOLLWERK: Right.

12 MR. SPANGLER: -- for easier
13 identification.

14 JUDGE BOLLWERK: Okay.

15 MS. DIAZ-TORO: Your Honor, the Section
16 6.3 of our proposed 2019 methodology, the geo
17 references, that's where we would use the -- you know,
18 it's included in our methodology that we would
19 identify the location, the specific location, using
20 the GIS.

21 JUDGE BOLLWERK: Right. And you'd flag
22 them, and you'd put a pin flag, probably, or something
23 like that, to let people -- all right. Okay. Let me
24 ask one question. Did you contemplate any kind of
25 sampling would be used? And I'll refer to NRC-23 at

1 2 in the original Powertech proposal.

2 They were talking about doing sampling, so
3 any kind of -- I take it it was really up to the tribe
4 in terms of doing whatever they could accomplish?

5 MR. SPANGLER: The amount of acreage or
6 the location of the pedestrian survey would be
7 determined by the tribe and the tribe's priorities.
8 I might add that in a large-scale project, it is very
9 common to use a sample-oriented survey, just simply
10 for cost control.

11 JUDGE BOLLWERK: All right. And if I'm --
12 and again, correct me if I'm wrong, but I believe
13 under both the March 2018 approach and what we now
14 heard is called the, I guess, February 2019 proposal,
15 I think that's how we're referring to it, and what
16 relative to the March 2018 approach, it's NRC-214 at
17 Pages 15 and 16, there were basically supposed to be
18 19 days where they were going to have an opportunity
19 to do fieldwork; do survey, field survey, work.

20 MS. DIAZ-TORO: In the March 2018? I'm
21 sorry, which --

22 JUDGE BOLLWERK: I believe so, if I
23 counted correctly, because there were -- it was in two
24 -- different increments, there were two two-week
25 increments, but if you count the number of days that

1 were allocated, it was actually 19 days rather than
2 20.

3 We can -- I mean, we don't have to quibble
4 about it, but it's sort of --

5 MS. DIAZ-TORO: If that's what it comes
6 out to, then --

7 JUDGE BOLLWERK: All right. Well, it is
8 what's in the --

9 MS. DIAZ-TORO: I mean, if we would have
10 worked on Saturdays, I mean, if that would have been,
11 you know, something that the group agreed to work on
12 a Saturday, you know --

13 JUDGE BOLLWERK: Right. Well, I think it
14 said, for instance, maybe they'd want to take some
15 days off --

16 MS. DIAZ-TORO: Sure.

17 JUDGE BOLLWERK: -- maybe, but the total
18 that was allocated was 19 days, if all the time was
19 used as described in the project --

20 MS. DIAZ-TORO: Yes, then yes.

21 JUDGE BOLLWERK: Okay. So I guess one of
22 the things I'm interested, from the staff's
23 perspective, is, how much of this site did you
24 contemplate they'd be able to cover?

25 MS. DIAZ-TORO: The 2600 acres.

1 JUDGE BOLLWERK: You thought they'd be
2 able to do 2600 acres. The whole APE, essentially.

3 MS. DIAZ-TORO: That was the goal.

4 JUDGE BOLLWERK: That's what you thought
5 they could do in those two-week periods.

6 MS. DIAZ-TORO: Yes.

7 JUDGE BOLLWERK: Okay. Let me just turn
8 to Mr. White or Dr. Morgan, if you want to give any
9 comments on my discussion with the staff here. And I
10 recognize there's a lot of variables in this, but just
11 given what we talked about.

12 MR. WHITE: We felt that we were -- we
13 would be able to cover the acreage as well because of
14 the other tribes that were participating. In February
15 of 2019, we did have the other THPOs from Rosebud,
16 Standing Rock, Cheyenne Rive were also there, so that
17 would increase the number of people who were
18 participating in that.

19 JUDGE BOLLWERK: Right. But I take it,
20 what I'm hearing you say, you thought you'd be able to
21 cover at least the 2600 acres in the APE, and maybe
22 some more outside that area then.

23 MR. WHITE: Yes, we were going to do as
24 much as we can with the short amount of time that we
25 were allotted.

1 JUDGE BOLLWERK: All right. Thank you.

2 JUDGE FROEHLICH: And let me just follow-
3 up on that last answer, because the other tribes would
4 be involved, they wouldn't each look at the manpower,
5 the person power, from multi-tribe would be spread out
6 over the entire APE, so that people from one tribe
7 would be, perhaps, doing one part of the acreage,
8 whereas, the members of another tribe would be doing
9 a different part? Is that --

10 MR. WHITE: Perhaps, but we never got into
11 those discussions and I can't speculate on that.

12 JUDGE FROEHLICH: Is it a problem because
13 they're members of different tribes, that they would
14 not recognize things that would be of significance to,
15 let's say, the Oglala Siouxs, or is the fact that you
16 have the other tribes that wanted to be involved
17 participating in the survey, and as long as there are
18 tribal members conducting it, things that are of
19 importance to the Oglalas would be identified?

20 MR. WHITE: I think going back to Dr.
21 Morgan said yesterday about the Oceti Sakowin, how she
22 explained our relationships to each other. I think
23 that is a pretty good -- gives you a pretty good idea
24 of how that would go.

25 JUDGE FROEHLICH: And I don't want to put

1 words in Dr. Morgan's mouth, but you said that would
2 be a positive step. It wouldn't be ideal, it would be
3 best if each tribe had an opportunity to cover the
4 entirety or was it acceptable that members of the
5 seven nations, or whatever, have similar enough
6 background that they would be able to satisfy the, I
7 guess, observations or they'd be sensitive enough to
8 pickup the items, areas, views, that are of importance
9 to the Oglalas?

10 DR. MORGAN: Yes, and the standard in the
11 TCP practice, and when CRM firms, they've got a large
12 group of crews working with them is, you have -- you
13 may have two groups of people and two crews, and you
14 have a crew chief who's leading everyone, and you have
15 two, at least one, sometimes two, depending on if the
16 tribe participates and sends somebody, and so you may
17 have several people on two different teams.

18 And they will go out and they will walk
19 the transects, per the crew chief's direction, because
20 they're running the show, and then if they find
21 something, then they will confer.

22 When they start out, they put down tobacco
23 and they pray, when they find something. They record
24 it, then they'll move on, but yes, the input -- if
25 someone finds something, then the input is given to

1 the crew chief.

2 And as I said yesterday, it's always a
3 deference to the lead tribe, if you will, and in this
4 case it would be the Oglala, and that these are
5 individuals, there may be a little bit of difference
6 in opinion, but the information is brought, they all
7 confer, they record, and they move on, and so yes.

8 JUDGE BARNETT: Before we go on, I'd like
9 to follow-up with Ms. Diaz or Mr. Spangler, so you're
10 covering 2600 acres over two weeks, is that correct?

11 MS. DIAZ-TORO: Four weeks.

12 JUDGE BARNETT: Okay. 2600 acres over
13 four weeks, 15 acres per person per day, did you all
14 figure that up to make sure you were staffed
15 appropriately?

16 MR. SPANGLER: I was just doing some math
17 here on my scratchpad, it would take 173 person days
18 --

19 JUDGE BARNETT: That's exactly what I got.

20 MR. SPANGLER: -- to do 2600 acres, and
21 that's definitely doable in a four-week period.

22 JUDGE BARNETT: Was that within your cost
23 estimate? Did you --

24 MR. SPANGLER: We did not provide a cost
25 estimate. Our approach was based on tribal

1 participation, not CRM involvement, or tribal cultural
2 survey involvement, we responded to the tribe's
3 concerns that they wanted tribal elders to conduct the
4 survey, that only they were qualified to do the
5 survey.

6 So we did not use a CRM approach and we
7 did not apply a CRM budget because it was not a CRM
8 survey.

9 JUDGE BARNETT: The CRM was out there
10 supporting, is that correct? No?

11 MS. DIAZ-TORO: Not for the 2019 proposal.

12 JUDGE BARNETT: Okay. Thank you.

13 JUDGE FROEHLICH: Going back to the
14 potential 2018 survey, I guess the parties had planned
15 on being together for two weeks to conduct that. When
16 the first week was taken up with the meetings with the
17 tribal council and discussions on methods to be used,
18 was it contemplated that there would be one week on
19 the ground or two weeks, i.e., that that first survey
20 opportunity would actually be three weeks because of
21 the week of consultation or was it going to be just
22 one week of on-the-ground site visit?

23 MS. DIAZ-TORO: It's sort of like a
24 hypothetical question for what could have happened.
25 Our approach, back in June 2018, I would say, also,

1 for 2019, there is flexibility in the -- in our
2 proposals and our approaches.

3 And so if we would have gone out and we
4 would have agreed on a methodology and would have gone
5 out to the field to implement it, I think we could
6 have discussed, certainly, whether an additional week
7 to -- you know, to have the full four weeks would be
8 feasible and would be appropriate.

9 And we could, you know, as a group,
10 achieve that. I mean, I think that we all -- we've
11 always been -- the NRC staff has always been open to
12 discussions like that and considerations such as the
13 one you're proposing on the -- back in June 2018, when
14 the updated June 2018 proposal from the Oglala Sioux
15 Tribe was provided. It was provided on a Friday, June
16 15th.

17 It consisted of fieldwork activity that
18 would take over a year and so, you know, that was also
19 a consideration for NRC at that time.

20 MR. WHITE: Can I follow-up on that?

21 JUDGE FROEHLICH: Yes.

22 MR. WHITE: Leading up to our June
23 meeting, we did discuss over the webinar, the
24 flexibility of NRC to be able to push the field -- the
25 two-week field activities back one week so that way we

1 could work on that methodology.

2 NRC refused and they were very rigid with
3 their timeframe, so that's a little bit of that
4 information there for you.

5 JUDGE FROEHLICH: In your declaration, Mr.
6 White, suggested at Paragraph 17, that the staff
7 should have conducted the interviews with or without
8 a pedestrian survey. How would have that helped
9 locate sites of significance to the Lakota people?

10 MR. WHITE: Our culture is oral and we
11 discuss things through stories and information is
12 transmitted through those stories and passed down
13 through generations. And so those people who are
14 traditional practitioners and who understand culture,
15 and our language, are able to talk about those things,
16 whether they're at the site or not.

17 JUDGE FROEHLICH: In the 2018 timeframe,
18 did the tribe propose to the staff, or suggest to the
19 staff, beginning with the interview portion as opposed
20 to continuing or starting the on-the-ground
21 inspection?

22 MR. WHITE: Can you ask that question
23 again?

24 JUDGE FROEHLICH: In 2018, when there were
25 difficulties in coming up with a methodology for the

1 site survey, the pedestrian survey, was there a
2 suggestion or a proposal by the tribe to conduct the
3 oral interviews during that first increment of time?

4 MR. WHITE: I don't recall. I don't
5 recall.

6 MS. DIAZ-TORO: Your Honor, can I add that
7 I just want to bring back the part -- or the staff's
8 efforts were focused on a pedestrian site survey
9 because that's what the tribe requested of us, that
10 the only way to identify, to locate, the tribes was
11 via on-the-ground pedestrian site survey.

12 We have been always open to, you know,
13 other approaches, but the tribe has said that, you
14 know, those other approaches would not be -- they
15 would not be able to locate and identify the specific
16 -- you know, the location of those sites and that the
17 only way to do that would have been with a pedestrian
18 site survey.

19 So our efforts have been focused, always,
20 on that, since -- for a number of years. The oral, we
21 do understand that the oral history interviews are
22 important, and so that's why they are a component,
23 coupled with the pedestrian site survey.

24 JUDGE FROEHLICH: Okay.

25 JUDGE BOLLWERK: I do have a question on

1 that one. Well, just so you contemplated there were
2 going to be oral interviews and to accommodate the
3 tribe, you felt that was an important thing to do.
4 How many were you thinking there might need to be, in
5 the staff's estimation? Talking about a dozen, we
6 talking two dozen, 50, 10?

7 MS. DIAZ-TORO: I'm sorry --

8 MR. SPANGLER: The number of individuals
9 that would be interviewed, is that the question?

10 JUDGE BOLLWERK: Yes, potentially.

11 MS. DIAZ-TORO: Oh, okay.

12 JUDGE BOLLWERK: An estimate. I mean, you
13 must have been thinking about this. What did you
14 think was going to -- you were looking at,
15 potentially?

16 MR. SPANGLER: When I began working on
17 this, I envisioned having numerous tribal elders
18 participating and in the Lakota tradition of
19 remembrance, I was hopeful that having them on the
20 site would prompt their remembrance of past events in
21 people that had been there.

22 In terms of the exact number, it would
23 have been contingent upon the tribal elders that were
24 made accessible to us for the purposes of the project.

25 JUDGE BOLLWERK: Would you anticipate at

1 least a dozen?

2 MR. SPANGLER: I would hope for at least
3 that.

4 JUDGE BOLLWERK: At least that. And how
5 long would each one last, approximately? I know you
6 said before you wanted people to talk to you, so you
7 asked them open-ended questions, and that takes some
8 time.

9 MR. SPANGLER: That takes some time.

10 JUDGE BOLLWERK: I mean, are we talking an
11 hour, two hours, based on your experience in these
12 sorts of things?

13 MR. SPANGLER: Based on my experience, it
14 really depends upon the informant. Some informants
15 are really talkative and they don't want to stop
16 talking.

17 JUDGE BOLLWERK: Right.

18 MR. SPANGLER: And it might take three or
19 four hours for them to complete their oration. And
20 other informants are more reserved and you have to
21 work with them with more specific questions. And
22 those interviews might be 15 to 20 minutes. It's very
23 --

24 JUDGE BOLLWERK: Variant?

25 MR. SPANGLER: Varies according to the

1 individual.

2 JUDGE BOLLWERK: The average, about an
3 hour, you think, at least?

4 MR. SPANGLER: That would be a good hour.

5 JUDGE BOLLWERK: All right.

6 MR. SPANGLER: A good average. Yes.

7 JUDGE BOLLWERK: All right. Thank you.

8 JUDGE FROEHLICH: Mr. White, what's
9 causing me a little bit of concern is that, in the OST
10 position statement, that's OST-42-R, at Paragraph 74,
11 it said, "Conducting interviews should be an important
12 source of information to characterize and protect the
13 already identified cultural resources, with or without
14 additional pedestrian survey."

15 Does that suggest that the information
16 that was being sought by the staff could have been
17 obtained solely by interviews with the elders and oral
18 interviews?

19 MR. WHITE: I have no comment on that.
20 I'm not an expert in that.

21 JUDGE FROEHLICH: I'm just confused that
22 there's a suggestion, at least, that the information
23 that the staff was seeking, perhaps, could have been
24 obtained with or without the additional pedestrian
25 survey.

1 And based on all the efforts to conduct a
2 pedestrian survey, I was kind of confused as to even
3 the suggestion that this information could be pulled
4 into the EIS without a pedestrian survey. And I
5 wonder if you can shed some light on that.

6 MR. PARSONS: Your Honor, perhaps some
7 legal frame of reference, similar to what the NRC
8 staff provided yesterday would be --

9 JUDGE FROEHLICH: Yes, Mr. Parsons.

10 MR. PARSONS: -- might be helpful. Part
11 of the legal test under 1502.22 is to gather available
12 information. So NRC staff was making the argument
13 that the on-the-ground survey information was
14 unavailable. And I think the point the tribe was
15 making, the point the tribe was making, was that there
16 is, regardless -- even if the Board were to accept the
17 premise that the cultural survey, on-the-ground
18 survey, was unavailable, there is additional available
19 information that exists that could have been obtained,
20 not to intimate that a change in the tribe's
21 longstanding position that a cultural resources survey
22 on the ground is necessary to satisfy NEPA.

23 But in the context of 1502.22, and that
24 legal test, there is available information extant in
25 the form of oral interviews that was -- would be

1 required under 1502.22 in order to meet that legal
2 test.

3 So I think that's the --

4 JUDGE FROEHLICH: Okay.

5 MR. PARSONS: -- may be the source of the
6 confusion.

7 JUDGE FROEHLICH: Thank you, Mr. Parsons.

8 MR. CARPENTER: While we're discussing the
9 legal issues, though, Your Honors, what we're dealing
10 with here in terms of satisfying NEPA, NEPA requires
11 a reasonable effort.

12 MR. PARSONS: The Tribe --

13 MR. CARPENTER: The 1502.22 factors
14 pertain to the unavailability of the information, not
15 the staff's reasonable effort under NEPA.

16 MR. PARSONS: The Tribe could not disagree
17 more with that characterization of the law.

18 JUDGE FROEHLICH: We'll save those types
19 of arguments, perhaps, for our closing statements, or
20 in post-trial briefs.

21 MR. PARSONS: Thank you.

22 JUDGE FROEHLICH: But thank you. On a
23 slightly different topic, there's been reference to
24 the efforts of the NRC tribal liaison and the Office
25 of Tribal Liaison within the agency, to what extent

1 was that office or a tribal liaison used in this case?

2 MS. DIAZ-TORO: The tribal liaison was
3 brought in for the discussions with the tribes
4 regarding the February 2019 draft proposed
5 methodology. I should know the exhibit number by
6 heart, but I don't, and I apologize. It's 214.

7 JUDGE FROEHLICH: Right.

8 MS. DIAZ-TORO: And it was brought in to
9 facilitate the discussions and negotiations between
10 the NRC staff and the Tribe.

11 JUDGE FROEHLICH: And as that -- as the
12 project manager, how did you utilize, I guess it was,
13 per services in the, I guess, discussions with the
14 Tribe?

15 MS. DIAZ-TORO: She was brought in to lead
16 the meetings, facilitate the meetings, so she was the
17 one conducting the meetings, the negotiations then,
18 and the, you know, discussions would be between the
19 two parties, but the individual tribal liaison that
20 was brought in was leading the meetings, facilitating
21 the meetings, and conducting the meetings.

22 JUDGE FROEHLICH: Okay. Just so I'm
23 clear, which meetings are these and when did they take
24 place?

25 MS. DIAZ-TORO: Oh, yes, so it's the

1 February 8, February 19, 2019 meetings.

2 JUDGE FROEHLICH: And did the NRC tribal
3 liaison accompany you and Mr. Spangler to the February
4 meetings at Pine Ridge?

5 MS. DIAZ-TORO: No. She --

6 JUDGE FROEHLICH: Here it comes, why not?

7 MS. DIAZ-TORO: Yes, so the -- first, she
8 was unavailable. She had another scheduled
9 commitment, so she could not attend. Our
10 understanding of the February 22nd meeting was that it
11 was going to be a Oglalas -- it was a meeting of the
12 Advisory Council, the Oglala's Sioux Tribe's Advisory
13 Council on Historic Preservation was a meeting to be
14 led by them, to be organized by them, and conducted by
15 them.

16 We did not want to impose or dictate the
17 NRC's tribal liaison on the conduct of that meeting,
18 since it was their meeting.

19 JUDGE FROEHLICH: Had the NRC tribal
20 liaison had any interaction or contact with the
21 Advisory Council?

22 MS. DIAZ-TORO: Not to my recollection.

23 JUDGE FROEHLICH: Let's talk about the
24 Advisory Council meeting and the, I guess, second, the
25 February 22nd trip to Pine Ridge 2019. What was the

1 purpose, I guess, of that trip out to Pine Ridge?

2 MS. DIAZ-TORO: Our understanding was that
3 we would meet with the Advisory Council of the Oglala
4 Sioux Tribe to discuss and answer questions about the
5 proposed February 2019 survey methodology.

6 JUDGE FROEHLICH: To discuss --

7 MS. DIAZ-TORO: The NRC- --

8 JUDGE FROEHLICH: 214.

9 MS. DIAZ-TORO: -- 214. Yes.

10 JUDGE FROEHLICH: Okay. And that meeting
11 was scheduled in advance?

12 MS. DIAZ-TORO: Yes.

13 JUDGE FROEHLICH: Okay. And it was to
14 begin on February --

15 MS. DIAZ-TORO: 22nd.

16 JUDGE FROEHLICH: And how long was it
17 scheduled to continue or how long was this meeting, or
18 group of meetings, to extend?

19 MS. DIAZ-TORO: That one day.

20 JUDGE FROEHLICH: Just one day. All
21 right. And I guess you started in the morning?

22 MS. DIAZ-TORO: So I wasn't -- we -- the
23 NRC staff started, or met, with the Tribe and the
24 Advisory Council, and the other THPOs that were
25 present from the other tribe, from the Lakota Sioux

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1 Tribes, in the afternoon.

2 You know, I would defer, certainly, to the
3 tribe who was the -- who was leading the meeting, that
4 meeting, about the agenda.

5 JUDGE FROEHLICH: Okay. All right. But
6 let me ask Mr. White then, that meeting that was
7 scheduled for February 22nd, that began in the
8 morning, I guess, among the Advisory Council members
9 without the NRC staff, is that correct?

10 MR. WHITE: Right. So because we reached
11 out to the other tribes, the THPOs then came in and
12 they talked amongst themselves about things that took
13 place leading up to this point, and also, the parts of
14 the methodology.

15 And so we met with the NRC staff and Mr.
16 Spangler in the afternoon. And, you know, we got
17 through approximately half of the methodology and then
18 we all agreed, as far as the THPOs, that, you know, it
19 would be good to sit down over the course of two to
20 three days, one session, to go through and fine tune
21 the methodology.

22 JUDGE FROEHLICH: Are these meetings of
23 the Advisory Council like regularly scheduled meetings
24 or was this a special meeting that was called to
25 address the staff 2019 methodology?

1 MR. WHITE: The Advisory Council meets
2 regularly and in this particular instance, it was
3 called in a special session.

4 JUDGE FROEHLICH: And this special session
5 was proposed to run just the 22nd or was it
6 contemplated that the representatives of the various
7 tribes would be there for an extended period of time?

8 MR. WHITE: It was for -- it was just for
9 that initial day to get everybody together to talk
10 about the methodology and then discuss amongst the
11 THPOs as far as their internal issues with methodology
12 and things that they would consider.

13 JUDGE FROEHLICH: And I guess, at that
14 meeting you had discussed a number of items in the
15 proposed methodology and the afternoon came, or the
16 evening came, and the meeting adjourned at what time?

17 MR. WHITE: It was, I believe it was,
18 after 5:00 p.m.

19 JUDGE FROEHLICH: And at the close of that
20 meeting, was there discussion of continuation or of a
21 subsequent meeting to finish the review of the 2019
22 proposed methodology?

23 MR. WHITE: Yes, I believe that the
24 overall feeling within the meeting was that we would
25 have another session, two to three days, where we

1 would sit down and continue the discussion.

2 One of the main things for that initial
3 meeting was to meet Mr. Spangler face-to-face, you
4 know, which is one of our customs, to be able to sit
5 down and introduce one another, and, you know, before
6 anything can happen, you know, to be able to talk
7 about things, talk about our culture, talk about our
8 history, you know, those things are important to us,
9 and those things need to happen, as, you know, is
10 custom with our traditional protocols.

11 And did the people, or persons, who --
12 from the Advisory Council who called this meeting, did
13 they propose a follow-on meeting or a continuation of
14 this meeting at the end, at 5 o'clock, or whatever?

15 MR. WHITE: Yes, they agreed that there
16 would be another two to three-day session, which we
17 never got to schedule, but they were all onboard to
18 attend the next meeting.

19 JUDGE FROEHLICH: All right. Ms. Diaz or
20 Mr. Spangler, what was your view, I guess, of the
21 invitation that you received to attend or meet with
22 the Advisory Council in February 2019?

23 MS. DIAZ-TORO: We did take that into
24 consideration when we went back to the office and
25 based on the statements made at the February 22nd

1 meeting with respect to the March 2018 approach, and
2 the agreed upon parameters documented in the March
3 2018 approach, the NRC staff reached a determination
4 that we really didn't have reasonable expectation that
5 we would be able to obtain agreement with the tribes,
6 since they were focusing on the March 2018 approach.

7 JUDGE FROEHLICH: Because of --

8 MS. DIAZ-TORO: So we made the
9 determination at that point to send a letter to the
10 Oglala Sioux Tribe to understand whether they would be
11 willing to continue to discuss the development of the
12 methodology based on the agreed upon parameters of the
13 March 2018 approach, and that's our March 1st, 2019
14 letter.

15 JUDGE FROEHLICH: Right. What was that
16 exhibit number?

17 MS. DIAZ-TORO: Yes, I'm going to look for
18 it right now, if I can find it.

19 MS. BAER: It's NRC Exhibit 215.

20 MS. DIAZ-TORO: Thank you.

21 JUDGE FROEHLICH: I didn't hear.

22 MS. DIAZ-TORO: 2-1-5.

23 JUDGE FROEHLICH: 2-1-5. All right. So
24 when you traveled on the 22nd, you had in mind, or
25 intended, a one-day trip for this meeting.

1 MS. DIAZ-TORO: It was our understanding,
2 based on the statements that we heard, that we were --
3 that there were, you know, fundamental disagreements
4 with the March 2018 approach, which we had, you know,
5 significantly and heavily negotiated since December of
6 2017, and that we were -- you know, we didn't have a
7 reasonable expectation that we would reach an
8 agreement, and that we would have to start over from
9 zero.

10 And so the time and resources to start
11 over from zero would be significant.

12 JUDGE FROEHLICH: So you didn't view the
13 tribal alternative proposal as a starting point or as
14 a way of moving towards the March 2018 approach. To
15 the staff, I guess, it was starting over, in your
16 mind.

17 MS. DIAZ-TORO: Based on what we heard at
18 the February 22nd meeting, yes.

19 JUDGE FROEHLICH: Okay. The intent, I
20 guess, of the Tribe, or of the Advisory Council, what
21 was the intent or the goal as you discussed the
22 proposed methodology? I mean, was this, basically, to
23 reset the clock and come up with an entirely new or
24 expanded version or was this a step to try to move
25 towards the timeline, or the outline, in the March

1 2018 approach?

2 MR. WHITE: We were preparing to continue
3 with what was set out by the Board originally, or to
4 continue that approach, and so, you know, we did want
5 some of those elements within our proposal that we
6 gave in June 2018 to be incorporated into that.

7 The items on the left column are the
8 important aspects that we wanted to negotiate.

9 JUDGE BOLLWERK: On the left column? I
10 guess that's my -- I want to make sure I understand
11 what -- I mean, what were your essential issues that
12 you were concerned about?

13 MR. WHITE: Getting out to the site, being
14 able to walk the area, and the elder interviews were
15 also concerns.

16 JUDGE BOLLWERK: So was it, I take it, was
17 still an essential concern of yours that you had an
18 opportunity to be out -- have the site visits over a
19 year period?

20 MR. WHITE: We wanted to be able to do a
21 pedestrian survey of the area in the amount of time
22 that we were -- the short amount of time that we were
23 allotted.

24 JUDGE BOLLWERK: So I guess I'm not -- it
25 sounds like I'm hearing that Ms. Diaz felt that many

1 of the things that would cause problems back in June
2 of 2018 were still on the table, and now maybe I'm
3 hearing from you, Mr. White, that they weren't, but I
4 -- anybody want -- we'll make one more check, I mean,
5 one more shot at this.

6 MS. DIAZ-TORO: Your Honor, if I may refer
7 you to the -- there's a meeting summary of the
8 February 22nd meeting.

9 JUDGE BOLLWERK: Yes. And that's got an
10 exhibit number, I'll bet.

11 MS. DIAZ-TORO: Yes. I'm --

12 MS. BAER: NRC-220.

13 JUDGE BOLLWERK: 220. Right.

14 MS. DIAZ-TORO: Thank you.

15 JUDGE BOLLWERK: As I recall, there was
16 some back and forth how that -- there was a draft at
17 one point, and it was edited, maybe I'm -- I don't
18 know which version I'm thinking about, but anyway,
19 we'll go -- we'll deal with 220 too, since that's --

20 MS. DIAZ-TORO: The summary of the
21 February 22nd meeting was developed by the Oglala
22 Sioux Tribe and provided to the NRC staff.

23 JUDGE BOLLWERK: Okay.

24 MS. DIAZ-TORO: And in that meeting
25 summary, it discusses the items that were raised as

1 concerns, as significant concerns, which are focused
2 on the length of the site survey, on the
3 reimbursement, and honoraria, and the -- which are
4 components of the agreed -- well, which are parameters
5 of the March 2018 approach.

6 MS. BAER: Just so Your Honors are clear,
7 this meeting summary was developed by the Oglala Sioux
8 Tribe and the redline, strikeout, and red additions in
9 the text were suggestions from the NRC staff.

10 JUDGE BOLLWERK: Okay. So those were your
11 edits on their document.

12 MS. BAER: Correct.

13 JUDGE BOLLWERK: Thank you. I appreciate
14 that.

15 MS. DIAZ-TORO: Yes.

16 MR. PARSONS: Your Honor, there's another
17 exhibit that has the actual summary. I'm having a
18 hard time on this exhibit finding the actual meeting
19 summary. It appears just to be selections of the
20 document that -- where NRC has made edits.

21 It may be useful to look at the actual
22 meeting notes as well.

23 JUDGE FROEHLICH: I'm sorry, are they an
24 exhibit?

25 MR. PARSONS: I believe it's NRC-217. No,

1 that's the February 19th. I'm sorry. Excuse me.

2 JUDGE BOLLWERK: It's 218, isn't it? NRC-
3 218? Have I got the --

4 MS. DIAZ-TORO: Yes.

5 JUDGE FROEHLICH: Meeting summary.

6 MR. WHITE: Yes.

7 MR. PARSONS: Thank you.

8 JUDGE BOLLWERK: So essentially, what I'm
9 hearing, what's in this meeting summary were your
10 important points.

11 MR. WHITE: Yes.

12 JUDGE BOLLWERK: And I guess, relative to
13 this was it the staff's impression that basically what
14 was raised in June of 2018 was still the main
15 concerns? I mean, this isn't --

16 MS. DIAZ-TORO: Similar concerns. Yes.
17 They also, in these meetings, raised -- the 2019
18 meetings, they also raised the concern with the, you
19 know, the use of the scientific method informing our
20 February 2019 survey methodology, which is NRC-214, in
21 addition to what we had heard in 2018 as well.

22 And the significant concerns and
23 criticisms on the heavy reliance on the LeBeau
24 methodology, that was problematic as well for them.

25 JUDGE BOLLWERK: All right.

1 MS. BAER: Your Honor, I would like to
2 clarify something. I misspoke about -- I apologize,
3 NRC Exhibit 222, no, sorry, 220, was prepared by the
4 NRC staff. The red lines were proposed revisions to
5 what is now NRC-218, which was prepared by the Tribe.

6 JUDGE BOLLWERK: So the redline changes
7 were the Tribe's.

8 MS. BAER: No, so the entire NRC-220 was
9 prepared by the NRC staff. It was our proposed
10 revisions to NRC-218.

11 JUDGE BOLLWERK: Okay.

12 MS. BAER: The red lines were specific
13 things that we wanted to change about the
14 characterization of the meeting.

15 JUDGE FROEHLICH: Okay.

16 JUDGE BOLLWERK: So can I take a --

17 JUDGE FROEHLICH: Yes, please.

18 JUDGE BOLLWERK: So the Tribe obviously
19 wanted input into the process by which Mr. Spangler
20 was ultimately hired, and that didn't happen, and
21 there's been questions raised by the Tribe about his
22 qualifications for the position that he has with the
23 staff.

24 Recognizing that, is your objection that
25 -- put it a different way. If the Tribe has its

1 choice of someone to, which you felt had the -- had
2 sufficient knowledge of the Lakota approach to the way
3 this TCP needs to be conducted, or the survey needs to
4 be conducted, the process needs to be conducted, that
5 was the Tribe, working for the Tribe, or employed by
6 the Tribe, or employed to work for the Tribe, would
7 you have an objection to Mr. Spangler performing the
8 function he does for the staff?

9 In other words, sort of, I don't want to
10 say, co-project directors, but basically, Mr. Spangler
11 is there for the staff, someone else is there for the
12 Tribe, which had sufficient knowledge, in your view,
13 could the two of them work together on this?

14 Are you saying Mr. Spangler shouldn't be
15 here at all. We can't understand what he's doing
16 here.

17 MR. WHITE: As a former director of the
18 NRA, I can't speculate as to what the Tribe would
19 recommend.

20 JUDGE BOLLWERK: All right. I have a
21 topic if we want to do it.

22 JUDGE FROEHLICH: Let's do it.

23 JUDGE BOLLWERK: Okay. Let's talk for a
24 second about programmatic agreements.

25 JUDGE FROEHLICH: Okay.

1 JUDGE BOLLWERK: So take this off. So
2 there is a programmatic agreement. Let me get to the
3 right page here. So the programmatic agreement is
4 NRC-018-B. I'm sorry. I'm having trouble reading the
5 screen. NRC-018-B.

6 And if you look at Appendix A, Table 1 to
7 the programmatic agreement, which is 18-B, has three
8 categories of sites; eligible sites, unevaluated
9 sites, and not eligible sites.

10 And I'm going to turn to the staff and,
11 sort of, maybe give me an explanation of how each type
12 of site is treated under the programmatic agreement in
13 terms of mitigation responsibilities. So let's start
14 with eligible.

15 MS. DIAZ-TORO: So an eligible site is one
16 that is -- has been found that is eligible for listing
17 in the National Register of Historic Places. That
18 meets one of the, you know, four criterias, A, B, C,
19 or D in 36 CFR 60.4?

20 MR. SPANGLER: 36 CFR 800.

21 MS. DIAZ-TORO: Well, I can find the exact
22 --

23 MR. SPANGLER: It's Bulletin 12, I think.

24 MS. DIAZ-TORO: It is in Bulletin 38. So
25 it's one that has been found eligible for listing or

1 that is listed in the National Register of Historic
2 Places.

3 JUDGE BOLLWERK: Yes.

4 MS. DIAZ-TORO: And unevaluated site in
5 the programmatic agreement is one that we have yet to
6 determine eligibility, whether it is eligible or not
7 eligible.

8 JUDGE BOLLWERK: Okay.

9 MS. DIAZ-TORO: And then not eligible is
10 that it has been found not eligible for listing in the
11 National Register of Historic Places.

12 JUDGE BOLLWERK: Okay.

13 MR. SPANGLER: If I can just interrupt.

14 JUDGE BOLLWERK: Yes.

15 MR. SPANGLER: That is NRC-179, Bulletin
16 15, how to apply National Register criteria for
17 evaluation.

18 JUDGE BOLLWERK: Okay.

19 MS. DIAZ-TORO: Thank you.

20 JUDGE BOLLWERK: And so we have the three
21 types -- three categories of sites, and under the
22 programmatic agreement, how is, I guess, Powertech
23 supposed to treat each one of those sites if they run
24 into one or have some impact on one as they're doing
25 their work?

1 So if someone's eligible, they have to
2 avoid it? What do they have to do?

3 MS. DIAZ-TORO: Currently, the preferred
4 -- yes, it's avoidance.

5 JUDGE BOLLWERK: All right. And if one is
6 unevaluated, what is Powertech required --

7 MS. DIAZ-TORO: The same.

8 JUDGE BOLLWERK: They have to avoid it.
9 And if it's not eligible?

10 MS. DIAZ-TORO: There's Section 106, does
11 not require an assessment of effects for uneligible or
12 sites that are not eligible.

13 JUDGE BOLLWERK: Okay. So basically, the
14 first categories, eligible and unevaluated, they have
15 to -- the preferred approach is to mitigate, is to
16 avoid --

17 MS. DIAZ-TORO: To avoid.

18 JUDGE BOLLWERK: -- and for not eligible,
19 they can simply proceed. All right. Okey-doke. So
20 Mr. Kyle's testimony, and that's OST-042-R, at
21 Paragraph 35, which is on Page 9, he indicates that,
22 "Tribal President Brewer, in February 2014, in a
23 letter, detailed issues with the programmatic
24 agreement", which is -- that letter is OST-12, and
25 indicates that, the letter indicates that, "OST did

1 not agree to the programmatic agreement and the
2 programmatic agreement process is undefined in terms
3 of future surveys and mitigation measures will be
4 implemented, including reimbursement of OST for
5 participation, Tribe participation."

6 Given this and the staff's own
7 acknowledgment that without the Tribe's identification
8 of additional cultural resources, it is difficult to
9 design mitigation measures for such resources, and
10 that's NRC-176-R-9, and I believe Mr. Spangler,
11 yesterday, said if you don't know what it is, you
12 can't necessarily do anything about it.

13 MR. SPANGLER: That's correct.

14 JUDGE BOLLWERK: How does the staff
15 envision that the programmatic agreement provisions,
16 which is NRC-118 -- I'm sorry, NRC-018-A at Page 10,
17 regarding unanticipated discoveries, will be
18 implemented, given the fact that OST cultural sites
19 have not been identified, or tribal cultural sites?

20 So in theory, they're out there. I don't
21 think there's anybody here, I've heard, that's saying
22 there's absolutely nothing that the Tribe might have
23 been able to identify if they had walked the site, it
24 talks about unanticipated discoveries, how is this
25 going to be handled?

1 I guess we're not talking about
2 unanticipated, because we don't know what it is, and
3 therefore, it's not unanticipated, it's there? Are
4 they going to be ignored, are they -- is somebody
5 going to be sent out to look for things like this, how
6 is it going to be handled?

7 MS. DIAZ-TORO: Let me start and then I'll
8 ask Mr. Spangler to add information. There is a
9 license condition.

10 JUDGE BOLLWERK: Okay.

11 MS. DIAZ-TORO: It gets License Condition
12 9.8, and I apologize, that, I don't know the exhibit
13 number for the license, but it is an exhibit.

14 JUDGE BOLLWERK: Maybe staff counsel can
15 give us that when we -- when it's --

16 MS. BAER: I don't have Internet access
17 and --

18 JUDGE BOLLWERK: Oh, that's unfortunate.

19 MS. BAER: -- all the old exhibits are on
20 the Cloud.

21 MS. DIAZ-TORO: Sorry.

22 JUDGE BOLLWERK: We'll find it and we'll
23 put it in the record.

24 MS. DIAZ-TORO: It's the license. It's
25 publicly available.

1 JUDGE BOLLWERK: Okay. We'll find it.

2 MS. DIAZ-TORO: It's the license for
3 Powertech.

4 JUDGE BOLLWERK: Okay.

5 MS. DIAZ-TORO: So should I continue?

6 JUDGE BOLLWERK: Yes.

7 MS. DIAZ-TORO: Oh, okay, so the license
8 condition -- a portion of the license condition calls
9 for Powertech to stop any activities that they are
10 conducting if they encounter a new -- you know,
11 something new that hasn't been there, and then we
12 would have to engage the appropriate parties to
13 discuss and assess the new discovery, so that's how it
14 would happen.

15 That's how unanticipated discoveries would
16 be handled. We would -- they would stop, we would get
17 together with the appropriate tribes to identify,
18 appropriately evaluate, determine if it's eligible,
19 not eligible, identify impacts, and then assess
20 mitigation measures.

21 JUDGE BOLLWERK: Okay. So there's a
22 premise there that someone's going to know what it is,
23 but the Tribe is the only one that knows what these
24 things are. How is Powertech going to know that they
25 run into something?

1 MR. SPANGLER: Maybe I can address that
2 for you.

3 JUDGE BOLLWERK: That'd be fine.

4 MR. SPANGLER: In these types of projects,
5 certain sites or features are visible on the surface,
6 but a lot are not. They're buried through the process
7 of erosion.

8 JUDGE BOLLWERK: Yes.

9 MR. SPANGLER: And the standard practice
10 with any development is that you have a monitor onsite
11 that's qualified to recognize these type of historic
12 properties, and they basically stand there with a
13 hardhat all day watching the backhoe as it moves dirt,
14 and if they see anything, a charcoal lens or an
15 artifact, everything stops.

16 And at that point, under 106, there's a
17 consultation provision with the state SHPO, and I'm
18 not well versed on the South Dakota protocols of when
19 the THPOs, or the Tribal Historic Preservation
20 Officers, get informed of the inadvertent discovery.

21 But the process of having a monitor there
22 is to have someone there that would recognize those
23 resources if they're exposed in a subsurface context.

24 JUDGE FROEHLICH: Would that be true even
25 if the Tribe, the Oglala, are not signatories to the

1 programmatic agreement?

2 MR. SPANGLER: Yes. As a -- all tribes
3 are informed of inadvertent discoveries. And that's
4 done on a government-to-government basis, the
5 communication with the Tribe, and it may occur from
6 the South Dakota SHPO to the tribes.

7 It's also important to note that it's not
8 just the Oglala who would be informed, it would be the
9 Cheyenne, all of the tribes that are participating in
10 this project, whether as formal signatories or not.

11 JUDGE BOLLWERK: Let me backup, so the
12 whole -- the survey was going to be a pedestrian
13 survey, we were never talking about excavation, so in
14 theory, this project was never about putting a shovel
15 or a trowel in the ground, it was about people walking
16 the site and finding things.

17 Powertech is going to be in areas and
18 they're going to be looking to do work, there's things
19 on the surface, which is what the tribe was supposed
20 to find, how -- and that we, I think, the monitor is
21 going to be the best archaeologist that Powertech can
22 hire, I guess, I have no idea, someone certainly who
23 is qualified to do what they're doing, but they're not
24 a tribal member. They don't know what to look for in
25 that context.

1 How are you going to spot these things
2 when the Tribe hasn't had an opportunity to identify
3 them?

4 MR. SPANGLER: The Applicant in this case
5 would be free to hire a tribal representative to be a
6 monitor.

7 JUDGE BOLLWERK: But they don't have to.

8 MR. SPANGLER: They don't have to.

9 JUDGE BOLLWERK: It's not required under
10 the programmatic agreement, is it?

11 MS. DIAZ-TORO: I'm sorry, I don't have
12 the programmatic agreement in front of me. I would --

13 JUDGE BOLLWERK: We can certainly stop and
14 take a look, because it's in the record.

15 MS. DIAZ-TORO: No, I don't have it and I
16 need to -- if you'll give me time to read it --

17 JUDGE BOLLWERK: Sure.

18 MS. DIAZ-TORO: -- and then --

19 JUDGE BOLLWERK: I'm not trying to --

20 MS. DIAZ-TORO: I just, there's no access
21 -- I don't have it printed it out and we all don't
22 have access to Internet, so I just need --

23 JUDGE BOLLWERK: Sure.

24 MS. DIAZ-TORO: -- to go back to the
25 programmatic agreement and read.

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1 JUDGE BOLLWERK: We have a copy of it,
2 don't we? We can certainly, if that's all right with
3 the parties, we'll lend it to them and let them look
4 at it.

5 MS. DIAZ-TORO: I just would -- just
6 because I didn't --

7 JUDGE BOLLWERK: Sure.

8 DR. MORGAN: May I provide some input?

9 JUDGE BOLLWERK: I'm not trying to make
10 you answer questions about document you can't look at
11 it. That wouldn't be fair. We're almost at noon
12 time. You want to --

13 MS. BAER: Your Honor, may I make one more
14 note, please?

15 JUDGE BOLLWERK: Sure.

16 MS. BAER: I would just like to note for
17 the record that this is -- the PA is really to NHPA,
18 which has been adjudicated and resolved.

19 JUDGE BOLLWERK: Correct, but it's still
20 in place, right? It's something they have to follow.

21 MS. BAER: Correct.

22 JUDGE BOLLWERK: Okay.

23 DR. MORGAN: May I provide some input.

24 JUDGE BOLLWERK: I've got no problem.
25 Sure. Go ahead.

1 DR. MORGAN: I'm not sure what's in the
2 programmatic agreement either, however, when
3 construction projects are going on like this one, when
4 there's intentional excavation going on, oftentimes in
5 -- there's an archaeologist that is onsite.

6 And there is also a tribal monitor onsite,
7 and the construction monitoring is completely separate
8 from the TCP or CRM survey.

9 And when the construction is going on and
10 they're digging, and if the archaeologist sees
11 something, they immediately stop the construction.
12 When the TCP individual sees something, they inform
13 the archaeologist, and the archaeologist stops the
14 excavator.

15 And it's pretty standard in the industry
16 that there's -- there are definite issues that occur,
17 but the standard is that the -- there's respect and
18 deference to that crew that's there doing the
19 construction monitoring, that the engineer, who's ever
20 working the backhoe, is going to respect what they
21 want, or whether it's an earth mover, or whatever.

22 But there's a separate piece that is
23 almost always included that includes the construction
24 -- that is called construction monitoring.

25 JUDGE BOLLWERK: Okay. And so my question

1 really is, if the staff's view of this prevails, and
2 there's no further survey work that's done, to
3 complete this licensing process, then does that mean
4 that, basically, whatever the Tribe is concerned about
5 on the site is not going to be assessed by anybody
6 that's a tribal member under the programmatic
7 agreement or am I misunderstanding it?

8 And I guess that's what they need to look
9 at the PA to tell us. That's my question. Have I
10 made it clear? Any questions about what I'm asking?

11 MR. SPANGLER: I can share my
12 understanding.

13 JUDGE BOLLWERK: Sure.

14 MR. SPANGLER: Is that the --

15 JUDGE BOLLWERK: I guess, she mentioned a
16 tribal monitor, is there going to be a tribal --

17 MR. SPANGLER: I would --

18 JUDGE BOLLWERK: -- a Oglala Sioux tribal
19 monitor onsite? I don't know.

20 MR. SPANGLER: As a professional
21 consultant, I would certainly recommend that --

22 JUDGE BOLLWERK: I sure would too, but
23 what does the programmatic agreement require?

24 MS. DIAZ-TORO: And that's what I want to
25 -- that's why I want to -- the time to go back to the

1 programmatic --

2 MR. CARPENTER: Your Honor, Mr. Pugsley
3 has the document pulled up. Can he provide that?

4 JUDGE FROEHLICH: Just before you do, Mr.
5 Pugsley --

6 MR. PUGSLEY: It's the programmatic
7 agreement that's in the record.

8 JUDGE FROEHLICH: All right. In the
9 record and I'd like to --

10 MR. PUGSLEY: I don't have an exhibit
11 number.

12 JUDGE FROEHLICH: Excuse me. In the
13 record, the Powertech license is NRC-012 and I believe
14 the programmatic agreement is Exhibit NRC-057. And if
15 we need them, we can, you know, project them or
16 whatever.

17 JUDGE BOLLWERK: Does Ms. Diaz need a
18 chance to look at them? Is this a time to break for
19 lunch and let them do that or do you want to --

20 JUDGE FROEHLICH: Let me -- maybe we'll
21 just change topics.

22 JUDGE BOLLWERK: Okay.

23 JUDGE FROEHLICH: Push things forward.
24 Are witnesses able to push forward a little further
25 before we take our lunch break? I am really trying to

1 make sure that all the questions are asked.

2 I don't want anyone slumping on to the
3 witness stand.

4 MS. DIAZ-TORO: I'm good.

5 JUDGE FROEHLICH: Go a little further?
6 Okay.

7 JUDGE BOLLWERK: Well, maybe we could take
8 a -- let's take a short break. I think the Board
9 needs to confer and find out where we are on the
10 schedule here. So that would probably be useful.

11 JUDGE FROEHLICH: All right. Let's take
12 a ten-minute break. We'll come back and then work a
13 little further before we take our lunch break.

14 MS. DIAZ-TORO: Thank you.

15 (Whereupon, the above-entitled matter
16 went off the record at 12:05 p.m. and resumed at
17 12:21 p.m.)

18 JUDGE FROEHLICH: All right. If we could,
19 begin.

20 JUDGE BOLLWERK: All right. First, we
21 need to clarify something on the record. I think
22 Judge Froehlich and myself, I think we added, created
23 a little confusion about the documents. NRC-018-A and
24 NRC-018-B are, as I understand it, the final
25 programmatic agreements.

1 (Whereupon, the above-referred to
2 documents were marked as Exhibit Nos. NRC-018-A and
3 NRC-018-B for identification.)

4 JUDGE BOLLWERK: NRC-057 and 058 are the,
5 a draft, and I should mention, 058 is an appendix.

6 (Whereupon, the above-referred to
7 documents were marked as Exhibit Nos. NRC-057 and NRC-
8 058 for identification.)

9 JUDGE BOLLWERK: 018-B is an appendix as
10 well. So those, so what we're talking about here are
11 018-A and 018-B, which are the final versions of the
12 programmatic agreement.

13 And before I have somebody from the staff
14 answer the question we were talking about, you
15 mentioned the word historic, and I guess that raises
16 the question, historic versus prehistoric versus
17 ancestral. Can you say a little bit about that,
18 because I know that becomes an issue sometimes?

19 MR. SPRANGLER: The use of the term
20 historic, in the context of Section 106, includes
21 prehistoric, historic. They're all referred to as
22 historic resources, or historic properties.

23 It's an all-encompassing term. It's not
24 meant to be from the time of Euro-American contact.
25 Within the context of 106, it includes it all.

1 JUDGE BOLLWERK: All right. Although,
2 many, some, I'd heard historic basically used for
3 post-contact, and prehistoric used for pre-contact, at
4 least on the East Coast. I don't know what it works
5 out here.

6 MR. SPRANGLER: It, within the context of
7 106, they, it's, the term historic property is all-
8 encompassing. It includes both pre-contact and post-
9 contact.

10 JUDGE BOLLWERK: So whatever they're
11 calling it out on the East Coast, in terms of the
12 archeological community, it doesn't make --

13 MR. SPRANGLER: Well --

14 JUDGE BOLLWERK: -- for 106's purposes,
15 it's not --

16 MR. SPRANGLER: In terms of the reports
17 and everything I write, I make a very distinct
18 separation between prehistoric and historic. But in
19 terms of the law, it's all --

20 JUDGE BOLLWERK: It's all, it's all in
21 one.

22 MR. SPRANGLER: -- it's all in one.
23 Thanks.

24 JUDGE BOLLWERK: All right. Thank you.
25 I appreciate that. All right. So we were talking

1 about the programmatic agreement, and the question, I
2 guess, was, how is the programmatic agreement going to
3 anticipate or deal with, or isn't it, the question,
4 the possibility that there are Oglala Sioux Tribe,
5 things, features, whatever, that they are concerned
6 about, that they are not going to, that they are not
7 going to have identified.

8 MS. DIAZ-TORO: Yes. So in the
9 programmatic agreement, consult, implementation of the
10 programmatic agreement would consist of consultation
11 with all the Tribes that were invited to participate
12 in the identification and evaluation of tribal
13 historic sites, and the development of the
14 programmatic agreement, regardless of whether they
15 have signed it or not.

16 We would, you know, reach out to the
17 Tribes, during implementation of the programmatic
18 agreement, we would reach out to the Tribes, and work
19 with them, consult with them under the programmatic
20 agreement.

21 And there are stipulations in the
22 programmatic agreement that require such consultation
23 with the Tribes for assessment of the eligibility of
24 unevaluated sites, assessment of adverse effects to
25 eligible sites, and resolution of adverse effects.

1 I'm going to build upon my colleague, Mr. Sprangler's,
2 discussion about a tribal monitor.

3 The programmatic agreement does have a
4 stipulation that would anticipate the use of, and I'm
5 going to quote a qualified archaeologist and/or a
6 tribal monitor, as part of the resolution, or
7 prevention of adverse effects.

8 And that, the objective would be for the
9 tribal monitor to be present during construction.
10 Activities to, and I'll just, I'll just read it. The
11 objective of the monitoring is to protect known sites
12 from construction impacts, comma, identify, at the
13 time of discovery, any archaeological materials
14 exposed during ground disturbance, and protection, and
15 protect such resources from damage until procedures
16 for discoveries, per stipulation number 9,
17 unanticipated discoveries, are implemented.

18 So the tribal monitor would be there to
19 identify, you know, be able to provide input, if an
20 unanticipated discovery is encountered.

21 JUDGE BOLLWERK: So it would be whose
22 responsibility to hire this person?

23 MS. DIAZ-TORO: Sorry, I have to read a
24 little bit further.

25 JUDGE BOLLWERK: Tribal monitor and/or

1 archaeologist on, I think we're --

2 MS. DIAZ-TORO: I have to look at --

3 JUDGE BOLLWERK: -- talking about probably
4 about a tribal monitor.

5 MS. DIAZ-TORO: -- stipulation number 9.
6 I'm sorry. Don't, I'm on my phone, so with the final
7 programmatic agreement.

8 JUDGE BOLLWERK: We --

9 MS. DIAZ-TORO: I mean, it's, I just, like
10 I said, I'm not --

11 (Off microphone comments)

12 JUDGE BOLLWERK: I'm sorry, we don't.
13 It's one of the prior, the exhibits from the prior
14 proceeding. I apologize.

15 (Off microphone comments)

16 JUDGE BOLLWERK: We can, we can actually
17 bring it up, I guess. That would be another option,
18 if you want to do that.

19 (Off microphone comments)

20 JUDGE BOLLWERK: You have access to it.

21 MS. DIAZ-TORO: What was your --

22 JUDGE BOLLWERK: There it is. If you want
23 us to scroll someplace, we can certainly do that.

24 MS. DIAZ-TORO: I was reading, what was,
25 can you repeat your question, Your Honor, please?

1 JUDGE BOLLWERK: Sure. So the question,
2 the question is, they're, you're talking, the
3 programmatic agreement seems to provide for the fact
4 there will be an archaeologist and/or tribal monitor
5 there, and who pays for that? Whose responsibility is
6 it to hire the person, and to make sure they're there?

7 MS. DIAZ-TORO: I think that that would be
8 something that we would discuss during implementation
9 of the programmatic agreement. I am, there, I don't
10 think, in the programmatic agreement, I recall that
11 it's stipulated who pays or hires the tribal monitor,
12 so I don't, I would not like to speculate, I guess, at
13 this time, about that.

14 MR. PUGSLEY: You could start your review
15 on page 12, Subsection 13 of the programmatic
16 agreement.

17 MS. DIAZ-TORO: Thank you.

18 JUDGE BOLLWERK: Thank you.

19 MR. PARSONS: Actually, top of page 8
20 discusses it.

21 MR. PUGSLEY: That's another example.

22 MR. PARSONS: It starts --

23 JUDGE FROEHLICH: Thank you, counsel.

24 MR. PARSONS: It starts with if.

25 MS. DIAZ-TORO: Right. That's where the

1 tribal monitor comes into the programmatic agreement.

2 MR. PUGSLEY: And the section I
3 referenced, Your Honor, is about compliance
4 monitoring, Subsection 13.

5 JUDGE BOLLWERK: Section 13? And we --

6 MR. PUGSLEY: That's on page 12, starts on
7 page 12, Your Honor.

8 JUDGE BOLLWERK: Okay.

9 MR. PUGSLEY: And it says, in Subsection
10 C to that, Powertech will engage the services of a
11 monitor.

12 MS. DIAZ-TORO: Thank you.

13 JUDGE BOLLWERK: All right. So it sounds
14 like it's Powertech's responsibility then to have
15 someone there that, if there's an, can recognize and
16 deal with unanticipated discoveries.

17 MS. DIAZ-TORO: It appears so, yes.

18 JUDGE BOLLWERK: All right. Let me turn
19 to the Tribe and see if they have any comments about
20 what we've been talking about here.

21 MR. WHITE: I have no official comments.

22 JUDGE BOLLWERK: And since the Tribe
23 hasn't signed onto the programmatic agreement, would
24 they, nonetheless, work with Powertech, if it were
25 necessary, to make sure that things were found, were

1 appropriately identified?

2 MR. WHITE: I have no official comment.

3 JUDGE BOLLWERK: All right. I believe,
4 then, that concludes my questions about the
5 programmatic agreement. Thank you.

6 JUDGE FROEHLICH: All right. What I'd
7 like to do is, I have a few questions about, for the
8 staff, on the contracting process. I'm bringing
9 witness Sprangler onboard, and then a few questions on
10 the original plans to supplement the EIS.

11 I'd like to cover those two topics before
12 lunch so that counsel would have an opportunity to
13 prepare any questions they might want the Board to ask
14 of our, of our witnesses after lunch.

15 And after that portion, I believe we'll
16 have to have a brief, have to have a closed session
17 for some period of time, because of discussion of both
18 financial and SUNSI materials.

19 At the conclusion of the closed session,
20 the counsel will have a second opportunity to prepare
21 questions that they would like asked of the witnesses,
22 and hopefully we can do all of that today. All right.

23 Ms. Diaz, after the issuance of LBP-15-16,
24 there was a decision to supplement the FEIS. When did
25 the NRC staff decide to hire a contractor to take on

1 that role?

2 MS. DIAZ-TORO: The contract was awarded
3 in May of 2018. As to, I'm not sure I understand the
4 second part of your question, Your Honor.

5 JUDGE FROEHLICH: I wanted to go through
6 the process that the staff went through to bring
7 onboard a contractor to address the issues that came
8 out of LBP-15-16.

9 MS. DIAZ-TORO: Okay. So the, so the
10 final step to cure the Board-identified deficiency --

11 JUDGE FROEHLICH: Right.

12 MS. DIAZ-TORO: -- would be to provide a
13 supplemental analysis, supplement the EIS with the
14 information gathered from the implementation, the
15 execution of the pedestrian site survey.

16 JUDGE FROEHLICH: And would that be the
17 request for supplies or services of May 2018?

18 MS. DIAZ-TORO: Yes, I think the --

19 JUDGE FROEHLICH: That's Board Exhibit
20 005.

21 (Whereupon, the above-referred to document
22 was marked as Board Exhibit No. 005 for
23 identification.)

24 MS. DIAZ-TORO: Board Exhibit 005 is the
25 --

1 JUDGE FROEHLICH: Yes, that's a date of,
2 order date May 8, 2018.

3 MS. DIAZ-TORO: Well, I think that, I
4 think it's sub-task 3. It's the one that talks about
5 supplementing the EIS in the, in the contract.

6 JUDGE FROEHLICH: Okay. No.

7 MS. DIAZ-TORO: Yes. So in our, in the
8 contract with SC&A, task, I'm going to refer you to,
9 so if you scroll down to the --

10 JUDGE FROEHLICH: Task 3?

11 MS. DIAZ-TORO: -- a page that is titled,
12 it's numbered 10.

13 JUDGE FROEHLICH: Right. Okay.

14 MS. DIAZ-TORO: So that's task 3. That's
15 the last step, and it would consist of SC&A providing
16 a technical assistant to the staff to supplement the
17 final supplemental environmental impact statement for
18 the Powertech.

19 JUDGE FROEHLICH: Exactly. Task 3 --

20 (Simultaneous speaking)

21 JUDGE FROEHLICH: -- was the
22 supplementation of the FSEIS, and I believe in the
23 same statement of work task, task 2 was the request to
24 identify sites of historic, cultural, and religious
25 significance to the, to the Tribes.

1 MS. DIAZ-TORO: Yes.

2 JUDGE FROEHLICH: Same, it arises from the
3 same task order. All right. In the statement of
4 work, and that's in Board Exhibit 005-2, the task
5 order indicates that the contractor should provide
6 technical assistance to the staff for the
7 identification of sites of historic cultural and
8 religious significance to Lakota Sioux Tribe. What
9 criteria did the NRC use to evaluate the contractor's
10 qualifications for identifying these sites?

11 MS. DIAZ-TORO: So the purpose and the
12 role of the, of the SC&A, the contractor was not for
13 themselves to identify the tribal sites. Now, would
14 be with, that would be the Tribes, themselves.

15 JUDGE FROEHLICH: So it was intended that
16 the contractor would assist with the conduct of the
17 tribal site survey, and prepare the survey report?

18 MS. DIAZ-TORO: Yes.

19 JUDGE FROEHLICH: Okay. And that was to
20 be included in a supplement to the final FSEIS?

21 MS. DIAZ-TORO: That, yes.

22 JUDGE FROEHLICH: All right. And in the
23 process of selecting the contractor, did the
24 contractor propose any specific personnel to assist or
25 to take part in providing the technical assistance

1 that the staff was seeking?

2 MS. DIAZ-TORO: Mr. Sprangler.

3 JUDGE FROEHLICH: Mr. Sprangler, okay.

4 MS. DIAZ-TORO: Well, our, you know, Dr.
5 Nickens, originally. We, and we discussed yesterday,
6 that part of the procurement process.

7 JUDGE FROEHLICH: Okay. And then, there
8 was, there was a change order, or --

9 MS. DIAZ-TORO: Modification.

10 JUDGE FROEHLICH: -- supplement,
11 modification, because a key personnel --

12 MS. DIAZ-TORO: Correct.

13 JUDGE FROEHLICH: -- for formally --

14 MS. DIAZ-TORO: Yes.

15 JUDGE FROEHLICH: -- Dr. Nickens, now, Mr.
16 Sprangler was there. Okay. And as that, as part of
17 that, the staff had to do a separate, a second review
18 of the qualifications of the individual proposed
19 against the tasks in the task order.

20 MS. DIAZ-TORO: Yes.

21 JUDGE FROEHLICH: Okay. Did the NRC, or
22 the contract, contemplate any subcontractors for any
23 part of the work that's in this task order?

24 MS. DIAZ-TORO: No.

25 JUDGE FROEHLICH: No. All right. Task 2

1 of the statement, of the statement of work, at pages
2 7 and 8, describes the sub-tasks necessary for
3 identifying sites of historic, cultural, and religious
4 significance to the Lakota Sioux Tribe.

5 Task 2 appears to contain the bulk of
6 those task requirements. What is the current status
7 of the deliverables for each sub-task?

8 MS. DIAZ-TORO: So under Deliverable 2A,
9 page 8, Sub-task 2A, page 8, which is the review of
10 information available about historic, cultural, and
11 religious resources of significance to the Lakota
12 Sioux Tribe, that, the deliverable was the, Dr.
13 Nickens's literature review report.

14 JUDGE FROEHLICH: Okay.

15 MS. DIAZ-TORO: Sub-task 2B, B as in boy,
16 on page 8, Sub-task 2C, as in Charlie, oral history
17 interviews with tribal elders, on page 9, and Sub-task
18 2D, as in David, page 9, tribal site survey, and
19 survey report, all of that would be, would have been
20 the efforts to the, to develop, the one deliverable
21 there was, the one deliverable under those three sub-
22 tasks was the February 2019 proposed draft, cultural
23 methodology, NRC-214.

24 (Whereupon, the above-referred to document
25 was marked as Exhibit No. NRC-214 for identification.)

1 JUDGE FROEHLICH: Okay. All right. So
2 Sub-task 2A, the deliverable was a document that
3 consolidated the information gathered, that could be
4 used to supplement the EIS?

5 MS. DIAZ-TORO: Sub-task, wait, which one?

6 JUDGE FROEHLICH: That would be 2A, as in
7 Alpha.

8 MS. DIAZ-TORO: 2A was the literature
9 review report that Dr. Nickens prepared.

10 JUDGE FROEHLICH: Okay. And --

11 MS. DIAZ-TORO: And that's Exhibit -- I'm
12 sorry. It's NRC-224.

13 (Whereupon, the above-referred to document
14 was marked as Exhibit No. NRC-224 for identification.)

15 JUDGE FROEHLICH: Okay. And was Dr.
16 Nickens's report supplemented by the research that Mr.
17 Sprangler produced?

18 MS. DIAZ-TORO: No, it wasn't.

19 JUDGE FROEHLICH: All right. Mr.
20 Sprangler did research, looked and found a number of
21 other studies that shed light, or helped the staff
22 come up with a methodology. Okay. And so why isn't
23 that something that would have been covered under Sub-
24 task 2A?

25 MS. DIAZ-TORO: So I'm, let me see if I

1 understand it. The literature review report, NRC-224,
2 prepared by, yes, 224, prepared by Dr. Nickens, it's
3 not a survey methodology.

4 JUDGE FROEHLICH: All right.

5 MS. DIAZ-TORO: The NRC-214, which is the
6 proposed draft, cultural research survey, site,
7 research survey methodology, is dated February 2019,
8 is the methodology that we provided the Tribe for
9 discussions and negotiations.

10 JUDGE FROEHLICH: All right. So Mr.
11 Sprangler's work, that was in response, or how does
12 that get factored into the sub-task in the contract?
13 Isn't the work that he did, in effect, a supplement or
14 an addition to what Dr. Nickens produced?

15 MS. DIAZ-TORO: No.

16 JUDGE FROEHLICH: All right.

17 MS. DIAZ-TORO: They're two separate --

18 JUDGE FROEHLICH: All right.

19 MS. DIAZ-TORO: -- activities. The term,
20 what was, the literature review report, 224, NRC-224,
21 provided or established the context, with respect to
22 the geographic region, where the Dewey-Burdock project
23 would be constructed and operated, and it established
24 a significance of that geographic region to the Lakota
25 Sioux Tribes.

1 JUDGE FROEHLICH: All right. And under,
2 I guess, what sub-task will Mr. Sprangler be
3 compensated for the literature review and work that he
4 did?

5 MS. DIAZ-TORO: Because Mr. Sprangler did
6 not conduct a literature review report, he --

7 JUDGE FROEHLICH: Oh.

8 MS. DIAZ-TORO: -- would not be
9 compensated for that. It was Dr. Nickens who was
10 compensated, under Sub-task 2A. The work that Mr.
11 Sprangler, oh, sorry, I apologize. The work that Mr.
12 Sprangler conducted --

13 MR. SPRANGLER: Maybe I could just --

14 JUDGE FROEHLICH: Sure.

15 MR. SPRANGLER: I kind of see where you're
16 going here.

17 JUDGE FROEHLICH: I'm trying to figure out
18 how --

19 MR. SPRANGLER: One of the first steps in
20 --

21 JUDGE FROEHLICH: -- the task order --

22 MR. SPRANGLER: -- constructing any
23 methodology is to do a literature search for similar
24 types of projects, and what approaches were used.

25 JUDGE FROEHLICH: Okay.

1 MR. SPRANGLER: That type of a literature
2 search is entirely different than what we're talking
3 about there, which would be called a Class I
4 literature search. What I did was simply get myself
5 really well-versed, and what's been done before, as
6 far as methodologies go.

7 JUDGE FROEHLICH: Okay.

8 MR. SPRANGLER: And so the task order
9 that, it's referred to here as the literature search,
10 is, in the profession, what we call a Class I
11 overview, which is basically a synthesis of all of the
12 cultural materials known about a certain area that are
13 reasonably available.

14 And that can be books, it could be journal
15 articles, it could be site forms at the SHPO, it could
16 be oral histories filed with a university or a
17 college. It's everything that's reasonably available,
18 that, about, the cultural history of a particular area
19 is synthesized into one coherent narrative.

20 And that is what we're talking about with
21 the task order. My literature review had to do with
22 the methodology, and it didn't review those other
23 topics that Dr. Nickens addressed.

24 MS. DIAZ-TORO: Your Honor, if I may
25 provide some additional information with respect to

1 the entire process. So we have the literature review
2 report, Dr. Nickens, NRC-224, which is what Mr.
3 Sprangler was referring to as a Class I investigation.
4 That was conducted.

5 The next step was to develop the
6 methodology for the pedestrian, on the ground, site
7 survey with the Tribes, which is what Mr. Sprangler
8 developed and documented in NRC-214.

9 JUDGE BARNETT: That --

10 MS. DIAZ-TORO: Then --

11 JUDGE BARNETT: That would be covered
12 under Sub-task 2D, I believe.

13 MS. DIAZ-TORO: Correct.

14 JUDGE BARNETT: Okay.

15 MS. DIAZ-TORO: Yes. And, yes.

16 JUDGE FROEHLICH: Okay. All right. Under
17 the, okay. Under Sub-task 2B, that was the outreach
18 and, to the, to the, to the Tribes, and the
19 correspondence, and I guess the contractor has done
20 that for the, for at least the two meetings. One, Dr.
21 Nickens, one, Mr. Sprangler, as well as any telephone
22 or webinars. So that would be covered under 2B.

23 MS. DIAZ-TORO: Yes.

24 JUDGE FROEHLICH: All right. Thank you.
25 As to 2C, having to do with oral history interviews,

1 I guess there's no work that was done in that
2 category, or am I wrong?

3 MS. DIAZ-TORO: No, you're not wrong, but
4 --

5 JUDGE FROEHLICH: All right. And 2D, we
6 just talked about, is the tribal site survey and
7 survey report. The, I guess the, okay. What parts of
8 2D have been accomplished?

9 MS. DIAZ-TORO: Only a portion, which was,
10 only a portion of it, which was the development of
11 the, which was NRC-214, the proposed draft cultural
12 resource survey methodology.

13 JUDGE BOLLWERK: So let me ask it, this,
14 I, I'm going to refer to NRC, Exhibit NRC-204, and I'm
15 specifically looking at page, pdf page 5, or I think
16 it's page 6 of, page, sorry it's pdf page 6 or page 5
17 of the document.

18 (Whereupon, the above-referred to document
19 was marked as NRC Exhibit No. 204 for identification.)

20 JUDGE BOLLWERK: And I'm looking at the
21 paragraph called additional funding. And this was a
22 letter that the, this is a letter that the staff sent
23 in response to a tribal letter, raising some issues
24 about restarting the process after, back in, I believe
25 the letter is February, I'm sorry, January of 2019.

1 So this was before the final, the project
2 report had come out. And it says, in its, in its
3 response, the Tribe requests to be granted NEPA
4 coordinating agency status, receive self-determination
5 grants, or execute cooperative agreements.

6 These requests fall outside the scope of
7 negotiations on the methodology, and also cannot
8 feasibly be achieved within the adjusted timeline of
9 the March 2018 approach. And the adjusted timeline
10 means basically it would have been moved back from
11 doing the work in June of 2018, into potentially the
12 2019 time frame.

13 So notwithstanding the fact that the staff
14 had an objection to this proposal, could the staff
15 give me some idea about how such a grant process would
16 work, and how long it would take?

17 MS. DIAZ-TORO: Your Honor, I do, I do,
18 there are processes at the NRC for grants. I am not
19 familiar. I am not the expert on those. I would have
20 to, I'm --

21 JUDGE BOLLWERK: Since the letter says
22 cannot be feasibly achieved within the adjusted time
23 frame, you must have had some sense of what the time,
24 what, how long it would take to do one of these.

25 MS. DIAZ-TORO: It, we did, well, just

1 because of the nature of providing grants, does take
2 time to, for, to put into place. So generally, they
3 do take time.

4 And so we were, that was, to put it into
5 context, it was January 2019, and the timeline,
6 adjusted timeline that had been put forth identified
7 the first opportunities to go out into the field in
8 April, so that's where I think that we have to just
9 put it into context, into where we were at, at the
10 time, and the field opportunities scheduled, or
11 proposed scheduled, and the fact that, you know,
12 putting in, putting a grant together would take some
13 time.

14 JUDGE BOLLWERK: All right. Mr.
15 Sprangler, is there anything you can add about the
16 process, grant process, that you know about?

17 MR. SPRANGLER: I can speak to the process
18 of applying for government grants. Not this grant
19 specifically, but through the NGO, that I've been
20 involved with.

21 We apply for grants all the time, and the
22 minimum is usually 12 months, and 18 months is
23 probably the outside range. So an average of maybe 12
24 to 14 months, 14 to 16 months, from application to
25 actual awarding.

1 JUDGE BOLLWERK: And I take it, are you
2 aware of the self-determination grant process, or how
3 the program works --

4 MR. SPRANGLER: I am not.

5 JUDGE BOLLWERK: -- outside of the fact,
6 you're not? All right.

7 MR. SPRANGLER: No.

8 JUDGE BOLLWERK: Let me turn to the Tribe
9 and see if there's anything that you all know, Dr.
10 Morgan, or any of the tribal members, about the grant
11 process that's being referred to here.

12 DR. MORGAN: It depends on the grant, and
13 the timeline that they have stipulated in their, in
14 their guidelines, as to --

15 JUDGE BOLLWERK: Well, I think what the
16 Tribe is proposing, is there a way that they could be
17 paid for this through a grant process, a federal
18 grant, and do you know anything about a grant program
19 that would've covered that?

20 DR. MORGAN: No, I do not.

21 JUDGE BOLLWERK: Okay. Anybody else? Mr.
22 White? No?

23 MR. WHITE: No, I do not.

24 JUDGE BOLLWERK: All right. Thank you.
25 Okay.

1 JUDGE FROEHLICH: Okay. I'd like to just
2 ask a few questions about, I guess, the necessity or
3 the burden of producing a supplement to the EIS. As
4 the case moved along, on numerous occasions, the staff
5 indicated that they had intended to do a supplement to
6 the EIS after whatever data material surveys were
7 completed. At this point, I understand the staff does
8 not intend to supplement the EIS. Is that correct?

9 MS. DIAZ-TORO: The Commission practice
10 that has been established is that the NEPA record is
11 being currently supplemented by the adjudicatory
12 record.

13 JUDGE FROEHLICH: So that when the staff
14 indicated, I guess, in correspondence, and in
15 teleconferences, that their intent was always to
16 supplement the EIS, and thereby, provide all parties,
17 as well as the members of the public, opportunity to
18 comment on that, that was sort of the plan or the
19 understanding going forward.

20 Now, because you're telling me that
21 they're going to consider the record of our
22 adjudicatory proceeding, that opportunity for members
23 of the public or the Tribe won't have that opportunity
24 to file public comments to it?

25 MS. DIAZ-TORO: The intention was to

1 supplement the EIS if the information would have been
2 available, because the NRC staff is, we have concluded
3 that the information sought is not available, then
4 we're not conducting that portion of supplementing the
5 EIS.

6 JUDGE BARNETT: But you did get some of
7 the information, right? You got the information from
8 Task 2A, correct?

9 MS. DIAZ-TORO: I did get, it's a new
10 document from Sub-task 2A. It's not information that
11 I, it's not a methodology. It doesn't identify new
12 tribal site surveys, or provides information about the
13 significance of known tribal sites, tribal sites of a
14 significance to the Oglala Sioux Tribe, and
15 accordingly, because I don't have that information, I
16 can't conduct an assessment of impacts, which is what,
17 you know, the goal of NEPA would be, to identify the
18 impacts, and identify mitigation measures. But I
19 don't have the information in order to conduct an
20 impacts assessment.

21 JUDGE BARNETT: So does 2A serve any
22 purpose at all then?

23 MS. DIAZ-TORO: It, what 2A did was to
24 establish the context of the geographic region, the
25 significance of the geographic region to the Lakota

1 Sioux Tribes.

2 JUDGE FROEHLICH: Now, just to follow up,
3 if I may, Exhibit NRC-196 is a summary of additional
4 site data acquired in June 2018.

5 (Whereupon, the above-referred to document
6 was marked as Exhibit No. NRC-196 for identification.)

7 JUDGE FROEHLICH: Isn't this the type of
8 material that would go into a supplement to an EIS?

9 MS. DIAZ-TORO: The, 196?

10 JUDGE FROEHLICH: 196, I believe.

11 MS. DIAZ-TORO: Yes. So that report
12 documents data about the geographic location, the GIS
13 data of known tribal sites, the ones that were
14 identified in the archaeological survey, and the Class
15 III archaeological survey, and the 2013 tribal site
16 survey that was conducted with seven Tribes.

17 It only provides data. It don't, it
18 doesn't, it, the, it only provides data about those
19 sites, GIS locations. And this is not a picture of
20 one of them, but it's just a cover page. It does not
21 provide, or it does not identify sites of significance
22 to the Lakota Sioux Tribes.

23 It doesn't provide any information that,
24 about the significance of known tribal sites to the
25 Oglala Sioux Tribe. It's not a methodology. It's, it

1 doesn't, it doesn't provide the information that the
2 NRC staff would need in order to assess impacts.

3 JUDGE FROEHLICH: Okay. All right.

4 JUDGE BOLLWERK: All right. If we were to
5 assume, as an assumption, that the events that had
6 transpired over the last two years, approximately, had
7 all occurred before you'd issued an EIS, even a draft
8 EIS, and we were at the same point that we are now,
9 putting aside, no litigation involved.

10 This is just, you had worked, tried to
11 work with the Tribe, and you had not come to an
12 agreement, and you are where you are, I take it that's
13 something you would've put in the original EIS that
14 would've been reported.

15 MS. DIAZ-TORO: Which, what would I have
16 put, if you could --

17 JUDGE BOLLWERK: The fact that you could
18 --

19 MS. DIAZ-TORO: -- be more specific?

20 JUDGE BOLLWERK: -- that you tried to work
21 with the Tribe, and it didn't work out, that would've
22 been in the original EIS. Again, if the events that
23 would've transpired, putting aside the litigation,
24 forget the litigation, had simply, between you and
25 Tribe, you talked about this, and that you hadn't

1 worked it out, just as you haven't now, and this is
2 before you put out the original EIS, that would've
3 been in the EIS, correct?

4 MS. DIAZ-TORO: It is in, it was the, so
5 I'm going to talk, I don't like to speculate, but I
6 can talk about what's in the current EIS --

7 JUDGE BOLLWERK: Okay.

8 MS. DIAZ-TORO: -- and what's on the
9 current NEPA record, right, which, and the objections
10 from Tribes, with respect to the tribal site surveys,
11 their participation, or them not participating --

12 JUDGE BOLLWERK: Right.

13 MS. DIAZ-TORO: -- in the tribal site
14 surveys, discussed in 2013, is documented in the EIS.

15 JUDGE BOLLWERK: Okay. So I guess all I'm
16 saying is, potentially, there may have been more of a
17 factual discussion about what happened in the context
18 of what's transpired, but it would've been in the EIS,
19 just like there's information in the EIS now that says
20 we weren't able to work it out.

21 MS. DIAZ-TORO: Yes.

22 JUDGE BOLLWERK: Probably. All right.

23 MS. DIAZ-TORO: Probably.

24 JUDGE BOLLWERK: Well, I'll leave it at
25 that.

1 (Off microphone comments)

2 JUDGE FROEHLICH: All right. That
3 concludes the questions I had on the EIS, and on the
4 task order. What I propose is that we take a lunch
5 break at this point, and I would ask counsel if they
6 have any questions, follow-up questions that they
7 would like the Board to consider asking our witnesses,
8 that they prepare them over the lunch hour, and that
9 when we return at 2:00, we'll take that, we'll take
10 that up as the first order of business.

11 Is that, well, let me, does that give you
12 enough time, or should I build in some more time, with
13 the thought that, if we can, we'll try to finish
14 today? Is one hour sufficient for both lunch and
15 drafting of follow-up questions, I'd ask counsel?

16 MR. PARSONS: It's fine for us, Your
17 Honor.

18 MR. BALLANCO: It is fine for the Tribe.

19 JUDGE FROEHLICH: Okay.

20 MR. PUGSLEY: It's fine for us.

21 JUDGE FROEHLICH: Okay, and for the staff?

22 MS. BAER: It's fine for the staff as
23 well, Your Honor.

24 MR. PUGSLEY: Your Honor, just a question.
25 Is a handwritten copy that we submit, is fine?

1 JUDGE FROEHLICH: Handwritten is,
2 handwritten, please, watch your penmanship.

3 MR. PUGSLEY: Well, that, I can't help you
4 with.

5 JUDGE FROEHLICH: All right. So we'll
6 adjourn until 2 p.m., and then we'll take up follow-up
7 questions, and then I anticipate a closed session.

8 (Whereupon, the above-entitled matter went
9 off the record at 1:01 p.m. and resumed at 2:05 p.m.)

10 JUDGE FROEHLICH: All right. We'll be
11 back on the record. Before I collect any questions
12 that counsel may have prepared, Judge Bollwerk has a
13 few follow-up questions.

14 JUDGE BOLLWERK: I have two quick
15 questions, and if this affects anything that you were
16 proposing as a question, we'll give you an opportunity
17 to revise, or whatever you need to do.

18 I can tell we're getting down to the hardy
19 few here. The crowd has gotten smaller, but these are
20 the folks that really are interested, so two questions
21 I had, quickly.

22 We, I think, heard that the, Powertech is
23 responsible for hiring the monitoring under the
24 programmatic agreement for looking at anything that
25 might be unexpected, that might come up.

1 What role does the staff play in that?
2 Does the staff have any approval authority over that
3 monitor? Do they hear anything about it? How would
4 you know who it is, and, or do you care? I guess
5 that's the question.

6 MS. DIAZ-TORO: I think the tribal monitor
7 would be identified by the Tribe.

8 JUDGE BOLLWERK: What, now, this is --

9 MS. DIAZ-TORO: And so it would be a --

10 JUDGE BOLLWERK: -- the, this is the
11 monitor, well, it's the individual that Powertech will
12 hire to do the monitoring under the programmatic
13 agreement.

14 So the question is, does the staff have
15 any approval authority over that person? Do you
16 monitor who the monitor is? Do you only respond if
17 there's a problem? I guess my question is, how is
18 that handled?

19 MS. DIAZ-TORO: I don't think in the, I
20 don't there's a, in the programmatic agreement,
21 anything about NRC's approval or, you know,
22 authorization. I think it's in consultation with the
23 Tribe, the tribal monitor can be identified, and then
24 it can proceed per the programmatic agreement.

25 JUDGE BOLLWERK: All right. And do you

1 know, does this, does the designation of the tribal
2 monitor, do the other Tribes, do the Tribes need to
3 know who that person is? Is that part of the
4 agreement?

5 MS. DIAZ-TORO: We can inform the other
6 Tribes of who the tribal monitor is.

7 JUDGE BOLLWERK: Including the Oglala
8 Sioux.

9 MS. DIAZ-TORO: Including the Oglala Sioux
10 Tribe.

11 JUDGE BOLLWERK: All right.

12 MS. DIAZ-TORO: Yes. All consulting
13 party, all consulting Tribes.

14 JUDGE BOLLWERK: So you're committing to
15 do that, regardless of what the programmatic agreement
16 says?

17 MS. DIAZ-TORO: We can inform the Tribes
18 of who the tribal monitor would be, yes.

19 JUDGE BOLLWERK: Okay. So a separate
20 question, or just separate topic, we talked a little
21 bit about grants toward the very end, and the, I
22 raised this in the context of NRC-204, which is a
23 letter dated, I apologize, let me make sure I get the
24 right date.

25 It was an NRC staff, January 25th letter,

1 in response to an Oglala Sioux Tribe letter, dated
2 January 11, 2019. My question, quickly, is, obviously
3 they raised the question of a grant in that time
4 frame, and you, did they ever raise the question of a
5 grant with you previously?

6 MS. DIAZ-TORO: No.

7 JUDGE BOLLWERK: Not that you're aware of
8 then?

9 MS. DIAZ-TORO: Not that I'm aware of.

10 JUDGE BOLLWERK: All right. All right.
11 Let me just turn to the Tribe. Is there anything you
12 want to say about either of the questions I've asked
13 at this point, additional to --

14 DR. MORGAN: No, sir.

15 JUDGE BOLLWERK: Okay. That's, I think
16 I'm finished, then.

17 JUDGE FROEHLICH: Okay. At this point, if
18 the counsel for the parties have questions that they
19 would like the Board to consider asking the witnesses,
20 would you pass them forward?

21 We'll go off the record for 10, 15 minutes
22 to review them. We'll come back on the record in open
23 session, and address the proposed questions. So --

24 MR. PARSONS: We have none, Your Honor.

25 JUDGE FROEHLICH: You have none from the,

1 from the Oglala Sioux. Consolidated Interveners?

2 MR. BALLANCO: We have none, Your Honor.

3 JUDGE FROEHLICH: From Powertech?

4 MR. PUGSLEY: None, Your Honor.

5 JUDGE FROEHLICH: And from the Commission
6 staff?

7 MS. BAER: We also have no questions, Your
8 Honor.

9 JUDGE FROEHLICH: Wonderful. I mean, oh
10 --

11 JUDGE BOLLWERK: Are we doing our job here
12 or not?

13 JUDGE FROEHLICH: I don't know.

14 JUDGE BOLLWERK: I'm not sure. Okay.

15 JUDGE FROEHLICH: All right. In that
16 case, the only matters that we have left are to
17 consider and ask a number of questions on SUNSI
18 material, or financial material, or other documents
19 that had been designated as protected or sensitive.
20 So at this point, I would ask that the room be cleared
21 of --

22 JUDGE BOLLWERK: While we do that, can I
23 suggest we put on the record how we handle, tend to
24 handle the transcript, dealing with the closed
25 information?

1 JUDGE FROEHLICH: You want to do that now?

2 JUDGE BOLLWERK: I think, I mean, I think
3 it's good to have it on the public record.

4 JUDGE FROEHLICH: All right. The, there
5 will be a transcript of every word that's uttered in
6 this proceeding, both public and non-public. Anything
7 in the closed non-public session will be separate from
8 the open transcript, the public transcript.

9 At the close of the hearing, the parties
10 will be given an opportunity to review the transcript
11 of the closed session, and go through there, and
12 indicate whether any parts of it can be made public,
13 with the idea that, as much of that transcript, the
14 close transcript, should be made public, unless it
15 deals with specific matters that should remain
16 protected, so that the maximum amount of dialogue,
17 questions, and testimony is in the public domain.

18 JUDGE BOLLWERK: I think what we
19 contemplate, if I'm putting --

20 JUDGE FROEHLICH: Please.

21 JUDGE BOLLWERK: -- words in Judge
22 Froehlich's mouth, is that the party is, they do their
23 transcript corrections, and we offer them an
24 opportunity to look through the transcript, and
25 hopefully, as with the transcript corrections, you can

1 provide us joint information about what should or
2 shouldn't be redacted.

3 Obviously, if you can't agree, then you
4 need to let us know that. Just like with the
5 transcript corrections themselves, obviously we hope
6 those will be joint as well.

7 So that's what we contemplate. And I
8 guess we need, we will, at some point, talk about the
9 schedule at the end, probably, as well.

10 JUDGE FROEHLICH: Right. At the, at the
11 conclusion of the closed session, we'll go back into
12 open session, set a schedule for post-hearing,
13 pleadings, briefs, transcript corrections, and so on.
14 And that'll be the trigger for the decision of the
15 Board, and the date that it will be forthcoming.

16 JUDGE BOLLWERK: All right?

17 JUDGE FROEHLICH: Anything else? Okay.
18 Then I would, we have a list of those people who have
19 signed non-disclosure agreements. If you have, if you
20 do not have one on file with the Board, you'll have to
21 leave the room now, and I anticipate this should take,
22 hesitate to try to guess how long this will take, but
23 --

24 MS. BAER: Your Honor?

25 JUDGE FROEHLICH: Yes?

1 MS. BAER: Is it okay if Cinthya Roman
2 stays in the room? She's --

3 JUDGE FROEHLICH: A member of the staff.

4 MS. BAER: Yes, she's a member of the
5 staff.

6 JUDGE FROEHLICH: Right.

7 MS. BAER: She's a branch chief.

8 JUDGE FROEHLICH: All right.

9 MS. BAER: Thank you.

10 MS. DIAZ-TORO: And supervisor.

11 JUDGE FROEHLICH: And former project
12 manager.

13 MS. DIAZ-TORO: No.

14 JUDGE FROEHLICH: No? Never? Oh, okay.
15 All right. Yes, of course.

16 (Off microphone comments)

17 JUDGE BOLLWERK: How do you want to do
18 this? Do you want everybody to leave and then come
19 back in, or do you want to --

20 (Off microphone comments)

21 JUDGE BOLLWERK: It's really, well, I have
22 no idea. Yes, that must be the court reporter.

23 (Off microphone comments)

24 JUDGE BOLLWERK: He doesn't have an NDA.
25 It doesn't matter whether he's with them or not. I

1 hate to say it, but --

2 (Whereupon, the above-entitled matter went
3 off the record at 2:13 p.m. and resumed at 3:42 p.m.)

4 JUDGE FROEHLICH: If we could start up
5 again. For members of the public, all right. I just
6 wanted to inform members of the public who are
7 observing the proceedings today that the proceedings
8 were in closed session to discuss proprietary and
9 sensitive information, and there was a verbatim
10 transcript of all that was said during the closed
11 session.

12 We're going to establish procedures in
13 just a moment for the parties to review the transcript
14 in the hope that much of what was done in closed
15 session can be made public. So we have to just walk
16 through that procedure to ensure that material that
17 should be confidential, should be held as sensitive,
18 remains so. But the goal is to make as much of the
19 proceeding public.

20 At this point, I'll report that, at this
21 point, we are prepared to hear closing arguments from
22 counsel, for each of the parties, and then we'll
23 establish a procedural schedule for the balance of the
24 proceeding, as well as take care of a few
25 administrative matters, dealing with the exhibits in

1 the case. So closing arguments, all right. From,
2 yes.

3 JUDGE FROEHLICH: At the openings, we had
4 the staff go first. Okay.

5 CLOSING STATEMENT - STAFF

6 MS. BAER: Thank you again, Your Honors,
7 for this opportunity to address the Board. As we
8 stated yesterday in our opening statement, and in the
9 staff's pre-filed testimony, and statements of
10 position, the staff designed a reasonable methodology,
11 and reasonably determined the information it seeks
12 with respect to cultural resources, is unavailable.

13 Because the staff has satisfied the two
14 issues identified by the Board to be resolved in this
15 hearing, staff has met its NEPA burden, and Contention
16 1A should be resolved in the staff's favor.

17 First, the staff developed an objectively
18 reasonable proposed draft methodology. As the record
19 demonstrates, the staff's proposed draft methodology
20 was an integrated strategy that all parties, and the
21 Board, agreed was reasonable, including the two 2-week
22 periods to conduct the survey, and the \$10,000
23 honorariums.

24 The staff acted reasonably by hiring a
25 qualified contractor, and developing a methodology

1 that incorporated the feedback suggested by the Tribe,
2 acting under the understanding that all parties agreed
3 that those parameters were reasonable.

4 Much of the Tribe's testimony has focused
5 on numerous avenues that the staff did not take.
6 However, NEPA only requires the staff use a method
7 that is reasonable.

8 The Tribe suggested today that the NRC is
9 required to exhaust all possible avenues to obtain the
10 missing information in order to satisfy 40 CFR
11 1502.22. But 1502.22 does not eliminate NEPA's rule
12 of reason.

13 The Commission has held that the staff is
14 not required to conduct virtually infinite study and
15 resources, and that the agency must have some
16 discretion to draw the line and move forward with
17 decision making.

18 Throughout several years of negotiations
19 to develop an on the ground site survey methodology,
20 the staff has made extensive efforts to both solicit
21 and accommodate tribal input. 40 CFR 1502.22 does not
22 require additional substantive effort, but rather
23 provides the means to document the agency's basis for
24 determining that information is unavailable.

25 The staff has done so here through the

1 record of this proceeding, and has demonstrated that
2 it, that it reasonably determined that the information
3 it seeks is unavailable.

4 Proceeding separately with an approach
5 outside of the previously agreed upon parameters of
6 the integrated March 2018 approach would present
7 significant challenges in terms of both time and
8 resources.

9 Hiring a different contractor, proceeding
10 with oral interviews, or as Dr. Morgan suggested at
11 one point today, starting over completely, at this
12 point, would be inconsistent with the previously
13 agreed upon parameters of the March 2018 approach.

14 And just as fundamentally, given the
15 Tribe's insistence that a site survey is the only
16 means for getting the necessary information, it is
17 unclear how pursuing such incompletely defined
18 alternatives would even ultimately be found
19 sufficient.

20 Because the staff has acted reasonably in
21 the course of this lengthy proceeding, Contention 1A
22 should be resolved in the staff's favor. Thank you.

23 JUDGE FROEHLICH: Thank you, Ms. Baer.
24 Powertech, Mr. Pugsley?

25 CLOSING STATEMENT - APPLICANT

1 MR. PUGSLEY: Thank you, Your Honor.
2 Essentially, we believe our opening statement set
3 forth the bulk of our argument, but we believe that
4 the nature of this proceeding, over the past two days,
5 as well as the questions that have been asked, have
6 brought one fact further, two facts further to life.
7 Light, I'm sorry.

8 One, that while this hearing has been
9 limited in scope, the entirety of the proceeding, as
10 noted by the staff, needs to be taken into account
11 here in order for an adequate determination on this
12 contention to be rendered.

13 Secondly, the statement made by Powertech
14 in its opening statement regarding the relationship of
15 the information sought under the NHPA process, and the
16 inability to obtain it, is even more important now
17 than ever before.

18 So with that said, Powertech would like to
19 highlight the following points. One, as referenced by
20 the staff witnesses, License Condition 9.8 of its
21 license, which is typically referred to as an
22 unanticipated discovery license condition, is not
23 specific to Dewey-Burdock. It is industry-wide, and
24 as a matter, and I know, having worked on all of the
25 previous licenses issued, after promulgation of the

1 GEIS NUREG-1910, as well as the Hydro Resources
2 license in the State of New Mexico, those are
3 industry-wide, and more so, they are used not just in
4 this industry, but in others as well.

5 Mostly, it's done in ISR context, because
6 of the phase nature of the development of an ISR
7 project site. There has been ample opportunity to
8 participate in the process of identifying these sites
9 for all consulting parties that were identified by the
10 Nuclear Regulatory Commission staff prior to the
11 issuance of the license.

12 There has been discussion about mitigation
13 measures, which also was a contention in this
14 proceeding. The Board found, consistent with
15 Commission, and other federal case law, that full-
16 blown mitigation measures are not required to be put
17 in place at the time of license issuance. They are
18 developed over time.

19 That is indicative, that is indicated as
20 well in the programmatic agreement. So the provisions
21 are in place for this safeguard, going forward. The
22 106 process that has been referenced repeatedly is
23 closed.

24 The ACHP found that a reasonable good
25 faith effort was exerted by the agency in this manner.

1 Two, various parties signed off on the programmatic
2 agreement, including but not limited to the Nuclear
3 Regulatory Commission, the Bureau of Land Management,
4 the State of South Dakota SHPO Office, and the Board
5 closed this contention previously.

6 Another point that's important to
7 understand is given the length of questioning done on
8 federal procurement law at the beginning of this
9 proceeding. NRC staff is, by rule, constrained by
10 federal procurement law and the Commission's
11 implementing regulations of the Federal Acquisition
12 Regulation, and the Atomic Energy Act, Section, I
13 believe, 178.

14 This is not up for debate in this
15 proceeding, pursuant to 10 CFR 2.335(a) of the
16 Commission's regulations. The entire chain of events
17 culminating in the time, from the beginning to end of
18 this proceeding, culminating in the events that were
19 discussed in this proceeding over the past two days,
20 from 2017 to 2019, are, is proof positive that further
21 efforts in this endeavor are futile, and that the
22 staff's argument that the information is unavailable
23 is indeed correct.

24 Finally, Powertech would conclude its
25 argument here today that we believe NRC staff has done

1 everything in its power to obtain the information that
2 it sought, to further the NEPA process in accordance
3 with the Board's ruling in 2015, that information
4 should be deemed as a matter of law, unavailable,
5 under Council of Environmental Quality regulations,
6 and this matter should be closed. Thank you.

7 JUDGE FROEHLICH: Thank you, Mr. Pugsley.
8 The Consolidated Interveners?

9 CLOSING STATEMENT - CONSOLIDATED INTERVENERS

10 MR. BALLANCO: Thank you, Your Honor. As
11 we've seen throughout this proceeding, I think we have
12 a distinct difference, not just in the approaches to
13 this question, but the means to resolve the question.
14 On the one hand, staff is trying to demonstrate that
15 they've done enough.

16 They've made a reasonable approach. That
17 does not address the Tribe and the consolidated
18 intervener's concerns to provide actual protection for
19 cultural resources that we know are in the target
20 area.

21 There are cultural barriers to the
22 communication here, obviously, but we believe that
23 NEPA requires the hard look to provide actual
24 protection for these cultural resources. As we've
25 discussed, these are important, not just to the tribal

1 members, who can identify them, who know what they
2 are, they are important to all Americans, and that is
3 what NEPA demands for their protection.

4 It's difficult for the analogy to be made
5 when, I'm speaking in English, a written language.
6 When you think of cultural things in terms that work
7 in the mindset that's programmed in the English
8 language, Lakota is not a written language.

9 There are not books that can convey the
10 deep cultural values and properties that has to be
11 done through oral transmission. Many people are
12 familiar, for instance, with the Mayan calendar.
13 That's because Mayan is a written language.

14 Lakota have a cosmology, a study of star
15 knowledge, going back thousands of years, thousands of
16 years, before the time of the Greeks, that is
17 reflected in the language, in traditions, in songs.

18 In order to access this kind of
19 information, it requires tribal elders, tribal
20 spiritual leaders, and that's the only way to get
21 this. There are cultural properties within the target
22 zone, particularly as one of the witnesses testified,
23 if this is considered part of the race track, there
24 are valuable, just by being in a place, not an
25 artifact that someone's going to find, but there are

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1 locations where tribal members, for millennia, have
2 conducted ceremonies that correspond to patterns in
3 the stars. You can't just spell that out.

4 There has to be onsite detailed time
5 spent, ceremonies undertaken, in order to let this
6 information match the ground there. And that's the
7 only way to protect these cultural resources. There's
8 not another way to do it.

9 So no matter how many times we go back and
10 forth, I think the position from the tribal members,
11 certainly the consolidated interveners, will remain.
12 That's what has to happen.

13 If there's going to be actual protection,
14 it starts with getting tribal members on this
15 property, seeing what is there, and then, developing
16 a plan to protect those resources.

17 We haven't got there, and I think we need
18 to get there, and I think NEPA commands that we get
19 there. So if it means going back to the beginning,
20 then we have to go back to the beginning. Thank you.

21 JUDGE FROEHLICH: Thank you, Mr. Ballanco.
22 Mr. Parsons, for the Oglala Sioux Tribe?

23 CLOSING STATEMENT - OGLALA SIOUX Tribe

24 MR. PARSONS: Thank you, Your Honor. It's
25 clear through these proceedings that the Board has

1 taken these issues very seriously, and the questions
2 reflect a sincere attempt to get to the bottom of
3 these issues, and we definitely appreciate the time
4 and effort.

5 The Tribe thanks Dr. Morgan, Dr. Howe, and
6 Kyle White for their effective testimony today, and
7 the NRC for bringing this, considerable effort
8 bringing this proceeding out to South Dakota. I think
9 that's very important, and it is appreciated.

10 I do think the testimony that was elicited
11 today in particular shows that NRC staff has not met
12 its burdens. That the March '18, March 2018 approach,
13 as it was carried forward, was not ultimately
14 reasonable.

15 By capping the compensation, and indeed,
16 including no compensation for the actual people that
17 have to do the work on the ground, and by constraining
18 it in a narrow time frame, despite the fact that there
19 were no, before any methodology was in place, in fact,
20 before any, consulting any contractors with the
21 relevant experience, or even brought to bear, what we
22 found was that the contractor wasn't hired until, I
23 think the testimony was May of 2018.

24 So it should be expected that once you
25 bring in the qualified, or at least some qualifying

1 expert, or contractor, that you'll have to negotiate
2 and be flexible with regard to such basic things as
3 timing and cost. Because NRC staff was unwilling to
4 do that, it rendered that approach unreasonable.

5 Indeed, the Tribe's testimony, and what's
6 clear from the record is that the Tribe continually
7 attempted to make it work, willing, marshaling the
8 resources on its own account, without having the
9 honorarium paid, we were still, the Tribe was still
10 hiring its own experts to try to make this work. If
11 that's not a show of good faith, I don't know what is.

12 There's a, there's a strain through both
13 Powertech's and NRC staff's argument that somehow the
14 Tribe was unagreeable, and was trying to, would try to
15 put up roadblocks at every opportunity, and I think
16 the testimony shows precisely the opposite.

17 The Tribe was trying to get this work
18 done, both in 2018 and in 2019. The testimony was, at
19 the end of the meeting in February of 2019, the Tribe
20 expected to have multi-day meeting to really flush out
21 the methods, and get this in place and on the ground.

22 In response to those invitations, NRC
23 staff came back again with the same mantra, that is to
24 say, we will not negotiate with you on any cost, we
25 will not negotiate with you on any timing. This

1 process is over. And so for the, for the Tribe, it's
2 been a one-sided affair in terms of NRC staff putting
3 up the roadblocks, when the Tribe is looking to make
4 progress, including progress on the ground.

5 With respect to the legal standards at
6 1502.22, I think, I think the Board obviously is going
7 to look very carefully at those requirements. You
8 know our arguments with regard to the fact that we
9 think it all has to be within the EIS process, it has
10 to be out for public notice and comment. That's a
11 critical component.

12 But you heard argument, I think, today,
13 that that regulation does not require any additional
14 analysis, when, in fact, it does. Even if the Board
15 were to find the information unavailable, which we
16 think the record does not support, the regulation does
17 require additional analysis to be included in any EIS,
18 based on available information.

19 The Tribe was not attempting to convince
20 the staff to go to the ends of the earth to, and look
21 under every corner. I forget the terminology that
22 staff counsel used, but it's not, this information is
23 not difficult to acquire.

24 You heard from Dr. Howe and Dr. Morgan,
25 that there is information out there that's readily

1 available, that was not included in the literature
2 review, was not included in the methodology, and it
3 certainly was not included in any supplement to an
4 EIS. Information that is readily available.

5 So those portions of 1502.22, apart from
6 the unavailability issue, have not been satisfied, and
7 it is NRC staff's burden in this proceeding to show
8 that they've made those, to make those proofs, and
9 demonstrate compliance with 1502.22.

10 We think the record's clear, and the
11 testimony shows that those burdens were not met. And
12 the Tribe, for all the time we've already spent, it's
13 already spent, and resources that it's expended,
14 continues to want to work on these issues in the NEPA
15 context, and get these cultural resources identified
16 so they can be preserved and protected, and as you
17 heard, the National Historic Preservation Act process
18 is insufficient in that regard, because it only deals
19 with eligible properties, eligible sites.

20 That means that the site monitor that was
21 talked about is only there for listed sites. And so
22 that essentially leaves, from the Tribe's perspective,
23 a large portion of, what it would consider, highly
24 valuable sites left with no protections at all because
25 the NEPA process was never brought forward to

1 conclusion or to fruition.

2 And so the Tribe looks forward to briefing
3 these issues in depth, and look forward to the
4 Board's, no doubt, reasoned decision when it comes
5 out. Thank you very much.

6 JUDGE FROEHLICH: Thanks, Mr. Parsons. We
7 have a number of administrative procedural matters
8 that we should address before we close the record
9 today.

10 We have two subjects to take care of. I
11 wanted to, one, clarify that the exhibits that have
12 been identified for the record, those are the exhibits
13 that are in Appendix A to the Board's order, dated
14 August 22, 2019.

15 They have been identified for the record.
16 But, and as noted in the column, in capital letters,
17 they are not being identified or admitted into the
18 record of these proceedings. Those are the three
19 exhibits that were duplicates, that were submitted by
20 one party, and addressed the identical exhibit by
21 another party.

22 So among the list of exhibits in Appendix
23 A, three of them, NRC-201, OST-048, and OST-049 will
24 not be included as part of the record. The duplicate
25 will be included.

1 So that material is in the record, but
2 the, those three exhibits are not formally admitted,
3 because they're duplicates.

4 Secondly, the title on one of the
5 exhibits, it listed in Appendix A to the Board's order
6 of August 22, 2019, is Exhibit NRC-193.

7 (Whereupon, the above-referred to document
8 was marked as Exhibit No. NRC-193 for identification.)

9 JUDGE FROEHLICH: Okay. The title of that
10 exhibit has the dates confused. It is the OST January
11 19, 2018 response to the NRC's December 6, 2017.
12 Those are the two administrative matters that regard
13 exhibits in this record.

14 At this point, without objection, I just,
15 I want to ask if there's any objection to admitting
16 all of the exhibits that are identified in Appendix A
17 to the August 22, 2019 Board order into the record?
18 I know staff counsel had a comment early in the
19 proceeding about exhibits.

20 MS. BAER: No, we have no objections, Your
21 Honor.

22 JUDGE FROEHLICH: All right. So we will
23 instruct the court reporter to include in the
24 transcript of this proceeding, the Appendix A, from
25 the Board's August 22nd order, to be bound in the

1 transcript.

2 JUDGE BOLLWERK: As modified by what you
3 just said.

4 JUDGE FROEHLICH: By, as modified by what
5 I just said, so that it'll be clear going forward.
6 Also, among the procedural matters, Mr. Parsons, if
7 you could provide for the record, translations of the
8 first lines of the answers to the first questions to
9 Mr. White and Drs. Morgan and Howe, I think that would
10 aid the record to have not only the verbatim Lakota
11 words in the transcript, but a translation immediately
12 thereafter.

13 If you could, provide that to the court
14 reporter at the earliest practical date, I would ask
15 that they be included in the record of the proceeding
16 as well.

17 MR. PARSONS: Yes, Your Honor.

18 JUDGE FROEHLICH: Thank you. Am I timed
19 out here? I want to take this opportunity to thank
20 all the counsel, and especially the witnesses who gave
21 testimony in this proceeding, for all their efforts
22 here.

23 Certainly, the arguments of counsel, and
24 the testimony of the witness, will be a great help to
25 this Board in rendering a decision in this case. I

1 also want to thank the Rapid City Police Department,
2 who provided security, and the Alex Johnson Hotel for
3 providing this facility and its setup for it during
4 this proceeding.

5 I should also thank, at this point, court
6 reporter, Ms. Chilstrom, for her efforts in providing
7 a transcript for this case that we can all work from
8 in the briefing, and ultimately in the Board's
9 decision.

10 I'd like to discuss now with the counsel,
11 a procedural schedule to provide for transcript
12 corrections, and then findings of facts, conclusion of
13 law, brief following the proceeding.

14 The transcript should be available on a
15 three-day turnaround, on September 4th, and as I
16 understand it, that's transmitted to the parties
17 electronically. I think that parties should have a
18 reasonable opportunity to make any transcript
19 corrections, and also to review the transcript of the
20 closed session, to designate which portions must
21 remain in a protected transcript, and which portions
22 would be made public.

23 Those, that transcript review will have to
24 be filed through the protective, protected manner of
25 the EIE.

1 JUDGE BOLLWERK: Might we go do the two
2 filings. One for the --

3 JUDGE FROEHLICH: Right.

4 JUDGE BOLLWERK: -- transcript corrections
5 for public, and the other one for the redaction and
6 the, for the --

7 JUDGE FROEHLICH: Right.

8 JUDGE BOLLWERK: -- prior one.

9 JUDGE FROEHLICH: So transcript
10 corrections are corrections to what was, is not to
11 correct things that weren't said, only to correct
12 things that are misspelled, or garbled in the
13 transcript.

14 We can't revise what our witnesses have
15 testified to, but we can correct, you know, typos and
16 things that might, may have been, no offense to the
17 reporter, taken down wrong, or printed wrong.

18 So as Judge Bollwerk suggests, it's
19 probably best to do the transcript corrections and
20 transcript review in two separate filings, of course
21 the transcript corrections proposed will be filed
22 public, and those corrections, or those redactions to
23 the protected portion of the transcript should be
24 filed separately through the EIE, in the protected
25 mode.

1 Do the parties have a suggestion as to the
2 date they could have transcript corrections and
3 redactions completed, assuming the transcript is
4 available to you by September 4th? How long do you
5 need to do the transcript corrections and review the
6 protected transcript?

7 MR. CARPENTER: Your Honor, would one
8 business week be reasonable?

9 JUDGE FROEHLICH: Should we say September
10 13th, which is, I guess, nine days?

11 MR. CARPENTER: That would work.

12 MS. BAER: That's amenable for us.

13 JUDGE FROEHLICH: Does that work for
14 Powertech --

15 MR. PUGSLEY: Yes.

16 JUDGE FROEHLICH: -- and for the
17 interveners? Consolidated interveners and OST --

18 MR. BALLANCO: Works for us, Your Honor.

19 JUDGE FROEHLICH: -- a proposed transcript
20 correction date of September 13th?

21 MR. PARSONS: That's fine with us, Your
22 Honor.

23 JUDGE FROEHLICH: Okay.

24 JUDGE BOLLWERK: And again, a joint motion
25 is preferable, obviously, but if there's objections,

1 let us know.

2 MR. PUGSLEY: Your Honor, will the
3 portions of the transcript from closed session be in
4 a separate electronic file? Because some of us rely
5 on folks who did not sign non-disclosure affidavits to
6 help review the transcripts.

7 JUDGE BOLLWERK: Then the person probably
8 needs to file an NDA, and if they get it on record, we
9 can, you know, they will be put on the service list
10 for the, for the non-public e-filing protective order
11 file. So if they file that, they'll put, if not,
12 it'll go to you. You're on it, and --

13 MR. PUGSLEY: Yes, I just, the only reason
14 I ask, Judge Bollwerk, is that if I were to distribute
15 a pdf to someone who doesn't have an affidavit filed,
16 if it's not in two separate files, I couldn't
17 distribute that file, two separate pdf documents.

18 JUDGE BOLLWERK: It should definitely be
19 in a separate file.

20 JUDGE FROEHLICH: It is a separate file.

21 MR. PUGSLEY: Okay. Well, then I just
22 won't distribute it.

23 JUDGE FROEHLICH: But just to be clear,
24 the protected transcript can't be distributed to any
25 party, any person who has not signed the NDA.

1 JUDGE BOLLWERK: Right. You have to sign
2 the NDA to look at the transcript, just like you had
3 to sign the NDA to be in the room, so --

4 MR. PUGSLEY: Yes.

5 JUDGE FROEHLICH: Okay.

6 MR. PUGSLEY: Thank you.

7 JUDGE FROEHLICH: Board would propose
8 findings of fact and conclusions of law for October
9 11, 2019. That's probably one month from completion
10 of the transcript corrections.

11 Reply findings of fact and conclusions of
12 law would be due October 25, 2019, which will put the
13 Board on track to have an initial decision before
14 Christmas.

15 MS. BAER: Your Honor, I thought in a
16 previous Board order that the proposed findings of
17 fact and conclusions of law were due --

18 JUDGE FROEHLICH: The reply --

19 MS. BAER: No, the first one was due
20 September 27th, and that the reply was due October
21 11th.

22 JUDGE FROEHLICH: Right.

23 MS. BAER: Is that what you're proposing
24 now?

25 JUDGE FROEHLICH: And I wanted to shift

1 that to give parties more time to deal with the
2 protected transcript and transcript corrections. So
3 the original date, I think, of September 27th was
4 moved back to October 11th to give you more time.

5 MS. BAER: Our preference is actually to
6 go with the original dates.

7 MR. PUGSLEY: Agreed.

8 JUDGE FROEHLICH: I beg your pardon?

9 MR. PUGSLEY: Agreed.

10 MR. PARSONS: The Tribe feels that we do
11 need that additional time. Counsel for the Tribe does
12 have significant travel in the month of September as
13 well.

14 MS. BAER: And counsel for the staff has
15 travel planned for October, which is our preference
16 for the original dates.

17 MR. PUGSLEY: Well, more importantly, the
18 decision had been previously noted to be issued
19 November 29th, I believe.

20 JUDGE FROEHLICH: Right. Let's see if
21 there's a date between September 27th and October 11th
22 that will satisfy the parties.

23 JUDGE BOLLWERK: I mean, just in terms of
24 the decision, just so you're aware, under the Appendix
25 B, if I've got the right one, has to be issued within

1 90 days, and when the record closes, the record's not
2 going to close until we've got the transcript
3 corrections and all of the redactions taken care of.
4 So I think the December date is well within what the
5 Appendix B schedule is, but you know, obviously we'll
6 try to do it as fast as we can.

7 JUDGE FROEHLICH: Right. Okay. September
8 27th. Why don't we split the difference, and we'll
9 make the proposed findings of fact and conclusions of
10 law the initial one, due October 4?

11 MS. BAER: And then, the reply would be
12 due --

13 JUDGE FROEHLICH: And the reply would be
14 due, instead of October 25th, October 18th.

15 MR. PARSONS: That's acceptable to us,
16 Your Honor.

17 JUDGE FROEHLICH: Thank you. Okay.

18 MR. PARSONS: Oh, what --

19 MR. CARPENTER: We'll try to alter our
20 travel to accommodate that.

21 JUDGE FROEHLICH: Thank you. And in
22 recognition of that, the Board will attempt to
23 accelerate its decision to early December, as opposed
24 to before Christmas. With that, if there's nothing
25 further -- hearing none, I thank you all again for

1 your participation, especially for the testimony of
2 our witnesses, and the argument of counsel. Thank
3 you. We stand adjourned.

4 (Whereupon, the above-entitled matter went
5 off the record at 4:15 p.m.)
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**LIST OF OFFICIAL EXHIBITS
IN THE MATTER OF POWERTECH (USA) INC.
(DEWEY-BURDOCK IN SITU URANIUM RECOVERY FACILITY)
DOCKET NO. 40-9075-MLA
All EXHIBITS IDENTIFIED ON August 28, 2019**

ADAMS Accession Number	Official Exhibit Number	Title	Availability
<u>ML19242C238</u>	BRD-001-00-BD01	OFFICIAL EXHIBIT - BRD-001-00-BD01 - Color Version of Figure 3.9-1 from Environmental Impact Statement for the Dewey-Burdock Project in Custer and Fall River Counties, South Dakota, NUREG-1910, Supplement 4, Vol. 1 (Jan. 2014) (Ex. NRC-008-A-1).	Publicly Available
<u>ML19242C240</u>	BRD-002-00-BD01	OFFICIAL EXHIBIT - BRD-002-00-BD01 - Excerpt from Environmental Impact Statement for the Ross ISR Project in Crook County, Wyoming, NUREG-1910, Supplement 5 (Feb. 2014).	Publicly Available
<u>ML19242C243</u>	BRD-003-00-BD01	OFFICIAL EXHIBIT - BRD-003-00-BD01 - Strata Energy, Inc., Ross ISR Project, NRC Docket #040-09091, Scope of Work for Assessment of Properties of Religious and Cultural Significance (Aug. 31, 2012).	Publicly Available
<u>ML19242C246</u>	BRD-004-00-BD01	OFFICIAL EXHIBIT - BRD-004-00-BD01 - Excerpt from Enterprise Wide IDIQ Contract for Technical Assistance in Support of NRC Environmental and Reactor Programs.	Publicly Available
<u>ML19242C248</u>	BRD-005-00-BD01	OFFICIAL EXHIBIT - BRD-005-00-BD01 - Enclosure 2 to NRC Staff January 25, 2019 Letter (NRC- 204) in Response to Oglala Sioux Tribe January 11, 2019 Letter (NRC-203).	Publicly Available
<u>ML19242C251</u>	BRD-006-00-BD01	OFFICIAL EXHIBIT - BRD-006-00-BD01 - February 6, 2018 Notice of Summary Report of Counsel Conference Call with Attached Summary of Counsel-to-Counsel Meeting Held on February 1, 2018.	Publicly Available
<u>ML19242C253</u>	BRD-007-00-BD01	OFFICIAL EXHIBIT - BRD-007-00-BD01 - NRC Staff February 20, 2018 Letter to Powertech.	Publicly Available
<u>ML19242C255</u>	BRD-008-00-BD01	OFFICIAL EXHIBIT - BRD-008-00-BD01 - NRC Staff April 12, 2018 Letter to Crow Creek Sioux Tribe.	Publicly Available
<u>ML19242C256</u>	BRD-009-00-BD01	OFFICIAL EXHIBIT - BRD-009-00-BD01 - NRC Staff December 12, 2018 E-Mail Response to Oglala Sioux Tribe December 10, 2018 E-Mail.	Publicly Available
<u>ML19242C258</u>	BRD-010-00-BD01	OFFICIAL EXHIBIT - BRD-010-00-BD01 - Oglala Sioux Tribe June 8, 2018 E-Mail Response to NRC Staff June 8, 2018 E-Mail.	Publicly Available
<u>ML19242C260</u>	BRD-011-00-BD01	OFFICIAL EXHIBIT - BRD-011-00-BD01 - NON-PUBLIC - Kadrmass, Lee & Jackson, Inc., Scope and Fee for the U.S. Nuclear Regulatory Commission and Powertech (USA) (Oct. 2012) (Nonpublic).	Non-Publicly Available
<u>ML19242C262</u>	BRD-012-00-BD01	OFFICIAL EXHIBIT - BRD-012-00-BD01 - NON-PUBLIC - Makoche Wowapi / Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey-Burdock Project (2012) (Nonpublic).	Non-Publicly Available
<u>ML19242C265</u>	BRD-013-00-BD01	OFFICIAL EXHIBIT - BRD-013-00-BD01 - NRC Staff October 31, 2012 E-Mail to Tribal Historic Preservation Officers Forwarding October 31, 2012 NRC Staff Letter and Enclosed Revised Proposal for Dewey-Burdock Traditional Cultural Properties Study.	Publicly Available
<u>ML19242C189</u>	INT-023-00-BD01	OFFICIAL EXHIBIT - INT-023-00-BD01 - Affidavit - Testimony re Oglala Lakota Cultural Resources.	Publicly Available
<u>ML19242C185</u>	NRC-176-R-00-BD01	OFFICIAL EXHIBIT - NRC-176-R-00-BD01 - Prefiled Direct Testimony of	Publicly Available

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(DEWEY-BURDOCK IN SITU URANIUM RECOVERY FACILITY)
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All EXHIBITS IDENTIFIED ON August 28, 2019**

		NRC Staff.	
<u>ML19241A384</u>	NRC-177-00-BD01	OFFICIAL EXHIBIT - NRC-177-00-BD01 - Statement of Professional Qualifications of Diana Diaz-Toro.	Publicly Available
<u>ML19242C066</u>	NRC-178-00-BD01	OFFICIAL EXHIBIT - NRC-178-00-BD01 - Statement of Professional Qualifications of Jerry Spangler.	Publicly Available
<u>ML19242C286</u>	NRC-179-00-BD01	OFFICIAL EXHIBIT - NRC-179-00-BD01 - U.S. Department of Interior, National Park Services, National Register Bulletin 15, "How to Apply the National Register Criteria for Evaluation" (Rev. 1997).	Publicly Available
<u>ML19242C074</u>	NRC-180-00-BD01	OFFICIAL EXHIBIT - NRC-180-00-BD01 - Branam, Kelly M., et al., "Survey to Identify and Evaluate Indian Sacred Sites and Traditional Cultural Properties in the Twin Cities Metropolitan Area" (August 2010).	Publicly Available
<u>ML19242C079</u>	NRC-181-00-BD01	OFFICIAL EXHIBIT - NRC-181-00-BD01 - Stoffle, Richard W., et al., "The Land Still Speaks: Traditional Cultural Property Eligibility Statements for Gold Strike Canyon, Nevada and Sugarloaf Mountain, Arizona" (2000).	Publicly Available
<u>ML19242C081</u>	NRC-182-00-BD01	OFFICIAL EXHIBIT - NRC-182-00-BD01 - Toupal, Rebecca S., et al., "Cultural Landscapes and Ethnographic Cartographies: Scandinavian-American and American Indian Knowledge of the Land," Environmental Science and Policy 4:171-184 (August 2001).	Publicly Available
<u>ML19242C085</u>	NRC-183-00-BD01	OFFICIAL EXHIBIT - NRC-183-00-BD01 - North Dakota Department of Transportation, "Design Manual," Chapter II, "Environmental and Public Involvement," Section 5, "Cultural Resources," Revised March 6, 2017.	Publicly Available
<u>ML19242C088</u>	NRC-184-00-BD01	OFFICIAL EXHIBIT - NRC-184-00-BD01 - Ball, David, et al., "A Guidance Document for Characterizing Tribal Cultural Landscapes," Outer Continental Shelf (OCS) Study BOEM 2015-047, Bureau of Ocean Energy Management (2015).	Publicly Available
<u>ML19242C090</u>	NRC-185-00-BD01	OFFICIAL EXHIBIT - NRC-185-00-BD01 - Odess, Daniel, "A Landscape-Scale Approach to Mitigating Adverse Effects on Historic Properties," U.S. Department of the Interior Draft Document, June 6, 2016.	Publicly Available
<u>ML19242C093</u>	NRC-186-00-BD01	OFFICIAL EXHIBIT - NRC-186-00-BD01 - Summary of May 19, 2016, Meeting with the Oglala Sioux Tribe.	Publicly Available
<u>ML19242C096</u>	NRC-187-00-BD01	OFFICIAL EXHIBIT - NRC-187-00-BD01 - NRC November 23, 2016 Letter to the Oglala Sioux Tribe Regarding an Invitation for Teleconference and Continued Consultation.	Publicly Available
<u>ML19242C101</u>	NRC-188-00-BD01	OFFICIAL EXHIBIT - NRC-188-00-BD01 - Summary of NRC Staff and Oglala Sioux Tribe Teleconference Call on January 31, 2017.	Publicly Available
<u>ML19242C103</u>	NRC-189-00-BD01	OFFICIAL EXHIBIT - NRC-189-00-BD01 - NRC Staff April 14, 2017 Letter to Oglala Sioux Tribe - Coordination of Tribal Survey to Identify Cultural Resources.	Publicly Available
<u>ML19242C105</u>	NRC-190-00-BD01	OFFICIAL EXHIBIT - NRC-190-00-BD01 - Oglala Sioux Tribe May 31, 2017 Letter Responding to NRC's April 14, 2017 Letter.	Publicly Available
<u>ML19242C108</u>	NRC-191-00-BD01	OFFICIAL EXHIBIT - NRC-191-00-BD01 - NRC Staff December 6, 2017 Letter to Trina Lone Hill, Oglala Sioux Tribe, Regarding US Nuclear Regulatory Commission Proposal to Identify Historic, Cultural, and	Publicly Available

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		Religious Sites.	
<u>ML19242C110</u>	NRC-192-00-BD01	OFFICIAL EXHIBIT - NRC-192-00-BD01 - NRC March 16, 2018 Letter to Oglala Sioux Tribe Transmitting NRC's Approach to Identify Historic, Cultural, and Religious Sites.	Publicly Available
<u>ML19242C113</u>	NRC-193-00-BD01	OFFICIAL EXHIBIT - NRC-193-00-BD01 - Oglala Sioux Tribe January 19, 2018 Response to NRC's December 6, 2017 Letter.	Publicly Available
<u>ML19242C115</u>	NRC-194-00-BD01	OFFICIAL EXHIBIT - NRC-194-00-BD01 - Oglala Sioux Tribe's February 15, 2018 Responses to NRC Counsel Questions.	Publicly Available
<u>ML19242C118</u>	NRC-195-00-BD01	OFFICIAL EXHIBIT - NRC-195-00-BD01 - NRC November 21, 2018 Letter to Oglala Sioux Tribe Resuming Implementation of the NRC Staff March 16, 2018 Approach.	Publicly Available
<u>ML19242C098</u>	NRC-196-00-BD01	OFFICIAL EXHIBIT - NRC-196-00-BD01 - Summary of Tribal Cultural Heritage Resources Data Acquired in June 2018 at the Dewey-Burdock In Situ Uranium Recovery Project - Fall River and Custer Counties, South Dakota.	Publicly Available
<u>ML19242C120</u>	NRC-197-00-BD01	OFFICIAL EXHIBIT - NRC-197-00-BD01 - NON-PUBLIC - Oglala Sioux Tribe's June 12, 2018, Cultural Resources Survey Methodologies Proposal.	Non-Publicly Available
<u>ML19242C122</u>	NRC-198-00-BD01	OFFICIAL EXHIBIT - NRC-198-00-BD01 - NON-PUBLIC - Oglala Sioux Tribe's June 15, 2018 Updated Cultural Resources Survey Methodologies Proposal.	Non-Publicly Available
<u>ML19242C187</u>	NRC-199-R-00-BD01	OFFICIAL EXHIBIT - NRC-199-R-00-BD01 - Makoche Wowapi / Mentz-Wilson Consultants, Proposal with Cost Estimate for Traditional Cultural Properties Survey for Proposed Dewey-Burdock Project (2012) (Public redacted version).	Publicly Available
<u>ML19242C130</u>	NRC-200-00-BD01	OFFICIAL EXHIBIT - NRC-200-00-BD01 - NRC Staff July 2, 2018 Letter to the Oglala Sioux Tribe Regarding June 2018 Proposals.	Publicly Available
<u>ML19242C131</u>	NRC-202-00-BD01	OFFICIAL EXHIBIT - NRC-202-00-BD01 - Powertech's December 5, 2018 Response to NRC Staff's November 21, 2018 Letter Confirming Reimbursement and Honoraria.	Publicly Available
<u>ML19242C133</u>	NRC-203-00-BD01	OFFICIAL EXHIBIT - NRC-203-00-BD01 - Oglala Sioux Tribe's January 11, 2019 Response to NRC's November 21, 2018 Letter Proposing to Resume Negotiations.	Publicly Available
<u>ML19242C135</u>	NRC-204-00-BD01	OFFICIAL EXHIBIT - NRC-204-00-BD01 - NRC January 25, 2019 Letter in Response to Oglala Sioux Tribe Letter dated January 11, 2019.	Publicly Available
<u>ML19242C137</u>	NRC-205-00-BD01	OFFICIAL EXHIBIT - NRC-205-00-BD01 - February 8, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments.	Publicly Available
<u>ML19242C140</u>	NRC-206-00-BD01	OFFICIAL EXHIBIT - NRC-206-00-BD01 - LeBeau, Sebastian, "Reconstructing Lakota Ritual in the Landscape: The Identification and Typing System for Traditional Cultural Property Sites" (2009).	Publicly Available
<u>ML19242C142</u>	NRC-207-00-BD01	OFFICIAL EXHIBIT - NRC-207-00-BD01 - July 22, 2015 Letter from Dennis Yellow Thunder, Oglala Sioux Tribe, Responding to NRC's June 23, 2015 Letter.	Publicly Available

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<u>ML19242C144</u>	NRC-208-00-BD01	OFFICIAL EXHIBIT - NRC-208-00-BD01 - June 8, 2018 Letter from Travis Stills, Oglala Sioux Tribe, to the NRC Staff, Proposed Schedule for Cultural Resources Survey.	Publicly Available
<u>ML19242C146</u>	NRC-209-00-BD01	OFFICIAL EXHIBIT - NRC-209-00-BD01 - January 29, 2019 Letter from President Julian Bear Runner, Oglala Sioux Tribe, "Invitation to February 22, 2019, Meeting of the Tribe's Tribal Historic Preservation Advisory Council."	Publicly Available
<u>ML19242C149</u>	NRC-210-00-BD01	OFFICIAL EXHIBIT - NRC-210-00-BD01 - April 11, 2018 Powertech Response to NRC Staff's March 16, 2018 Letter Confirming Reimbursement and Honoraria.	Publicly Available
<u>ML19242C151</u>	NRC-211-00-BD01	OFFICIAL EXHIBIT - NRC-211-00-BD01 - Oglala Sioux Tribe March 12, 2019 Response to NRC's March 1, 2019 Letter.	Publicly Available
<u>ML19242C154</u>	NRC-212-00-BD01	OFFICIAL EXHIBIT - NRC-212-00-BD01 - September 24, 2015 Letter from Oglala Sioux Tribe. ML15267A377	Publicly Available
<u>ML19242C156</u>	NRC-213-00-BD01	OFFICIAL EXHIBIT - NRC-213-00-BD01 - Oglala Sioux Tribe's Counsel December 5, 2018 E-mail to NRC Counsel.	Publicly Available
<u>ML19242C158</u>	NRC-214-00-BD01	OFFICIAL EXHIBIT - NRC-214-00-BD01 - Proposed Draft Cultural Resources Site Survey Methodology. ML19058A153; ML19058A154; ML19058A155	Publicly Available
<u>ML19242C161</u>	NRC-215-00-BD01	OFFICIAL EXHIBIT - NRC-215-00-BD01 - NRC's March 1 Letter to Oglala Sioux Tribe - Negotiations Regarding Development of a Methodology for a Tribal Site Survey to Identify Historic, Cultural, and Religious Sites	Publicly Available
<u>ML19242C163</u>	NRC-216-00-BD01	OFFICIAL EXHIBIT - NRC-216-00-BD01 - NRC Staff's March 15, 2019 E-mail to Oglala Sioux Tribe Regarding No Additional Meetings.	Publicly Available
<u>ML19242C165</u>	NRC-217-00-BD01	OFFICIAL EXHIBIT - NRC-217-00-BD01 - February 19, 2019 Teleconference Call Summary with Oglala Sioux Tribe Comments (Draft).	Publicly Available
<u>ML19242C168</u>	NRC-218-00-BD01	OFFICIAL EXHIBIT - NRC-218-00-BD01 - Oglala Sioux Tribe's Summary of the Meeting with NRC Staff on February 22, 2019 in Pine Ridge, SD.	Publicly Available
<u>ML19242C170</u>	NRC-219-00-BD01	OFFICIAL EXHIBIT - NRC-219-00-BD01 - Oglala Sioux Tribe's March 30, 2018 Response to NRC Staff's March 16, 2018 Approach.	Publicly Available
<u>ML19242C173</u>	NRC-220-00-BD01	OFFICIAL EXHIBIT - NRC-220-00-BD01 - NRC Staff Comments on February 22, 2019 Meeting Summary.	Publicly Available
<u>ML19242C175</u>	NRC-221-00-BD01	OFFICIAL EXHIBIT - NRC-221-00-BD01 - Oglala Sioux Tribe's March 29, 2013 Letter, Invitation for Government to Government Consultation.	Publicly Available
<u>ML19242C177</u>	NRC-222-00-BD01	OFFICIAL EXHIBIT - NRC-222-00-BD01 - Patricia L. Parker, Traditional Cultural Properties: What You Do and How We Think, CRM, Vol. 16 (1993).	Publicly Available
<u>ML19242C179</u>	NRC-223-00-BD01	OFFICIAL EXHIBIT - NRC-223-00-BD01 - Oglala Sioux Tribe's January 31, 2011 Letter.	Publicly Available
<u>ML19242C182</u>	NRC-224-00-BD01	OFFICIAL EXHIBIT - NRC-224-00-BD01 - Nickens, Paul, Literature Review of Lakota Historic, Cultural, and Religious Resources for the Dewey-Burdock ISR Project.	Publicly Available

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<u>ML19242C236</u>	NRC-225-00-BD01	OFFICIAL EXHIBIT - NRC-225-00-BD01 - NRC Staff's Prefiled Reply Testimony.	Publicly Available
<u>ML19242C219</u>	OST-042-R-00-BD01	OFFICIAL EXHIBIT - OST-042-R-00-BD01 - Declaration of Kyle White.	Publicly Available
<u>ML19242C221</u>	OST-043-R-00-BD01	OFFICIAL EXHIBIT - OST-043-R-00-BD01 - Declaration of Dr. Kelly Morgan.	Publicly Available
<u>ML19242C224</u>	OST-044-R-00-BD01	OFFICIAL EXHIBIT - OST-044-R-00-BD01 - Statement of Professional Qualifications of Dr. Kelly Morgan.	Publicly Available
<u>ML19242C227</u>	OST-045-R-00-BD01	OFFICIAL EXHIBIT - OST-045-R-00-BD01 - Declaration of Dr. Craig Howe.	Publicly Available
<u>ML19242C192</u>	OST-046-00-BD01	OFFICIAL EXHIBIT - OST-046-00-BD01 - Statement of Professional Qualifications of Dr. Craig Howe.	Publicly Available
<u>ML19242C195</u>	OST-047-00-BD01	OFFICIAL EXHIBIT - OST-047-00-BD01 - April 6, 2018 Conference Call Transcript.	Publicly Available
<u>ML19242C198</u>	OST-050-00-BD01	OFFICIAL EXHIBIT - OST-050-00-BD01 - December 6, 2018 Conference Call Transcript.	Publicly Available
<u>ML19242C202</u>	OST-051-00-BD01	OFFICIAL EXHIBIT - OST-051-00-BD01 - January 29, 2019 Conference Call Transcript.	Publicly Available
<u>ML19242C203</u>	OST-052-00-BD01	OFFICIAL EXHIBIT - OST-052-00-BD01 - June 5, 2018 Open Site Survey "Methodology" Prepared by Dr. Nickens.	Publicly Available
<u>ML19242C206</u>	OST-053-00-BD01	OFFICIAL EXHIBIT - OST-053-00-BD01 - September 21, 2018 Oglala Sioux Tribe Response to Motion for Summary Disposition.	Publicly Available
<u>ML19242C209</u>	OST-054-00-BD01	OFFICIAL EXHIBIT - OST-054-00-BD01 - August 19, 2014 Transcript of Hearing with NRC Staff Corrections.	Publicly Available
<u>ML19242C211</u>	OST-055-00-BD01	OFFICIAL EXHIBIT - OST-055-00-BD01 - February 15, 2018 NRC Staff Billing Summary Data.	Publicly Available
<u>ML19242C216</u>	OST-056-00-BD01	OFFICIAL EXHIBIT - OST-056-00-BD01 - January 17, 2018 NRC Staff Response to January 9, 2018 Order.	Publicly Available
<u>ML19242C228</u>	OST-057-00-BD01	OFFICIAL EXHIBIT - OST-057-00-BD01 - March 7, 2013 NRC Staff Answer to Oglala Sioux Tribe Statement of Contentions on Draft SEIS (Excerpt).	Publicly Available
<u>ML19242C231</u>	OST-058-00-BD01	OFFICIAL EXHIBIT - OST-058-00-BD01 - April 13, 2018 Enclosure 1 to Letter from NRC Staff to Oglala Sioux Tribe.	Publicly Available
<u>ML19242C234</u>	OST-059-00-BD01	OFFICIAL EXHIBIT - OST-059-00-BD01 - June 15, 2018 Email from NRC Staff Counsel to Oglala Sioux Tribe Counsel; June 15, 2018 Email from NRC Staff to Kyle White, Oglala Sioux Tribe.	Publicly Available